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IN THE

# Supreme Court of the United States

October Term, 1977

No. 76-1802

FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO, a National Banking Association,

*Petitioner,*

vs.

DAKOTA NATIONAL BANK AND TRUST CO., a National Banking Association,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on April 14, 1977, petition for rehearing and suggestion for rehearing en banc denied on May 16, 1977.

## CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of North Dakota is printed in Appendix D hereto and is reported at 414 F. Supp. 1161. The opinion of the United States Court of Appeals for the Eighth Circuit, which reversed the judgment of the district court, is printed in Appendix C hereto and is not yet reported.

## JURISDICTION

The judgment of the court of appeals, printed in Appendix C hereto, was entered on April 14, 1977, the petition for rehearing and suggestion for rehearing en banc were denied on May 16, 1977. The appropriate order is printed in Appendix B hereto. The court of appeals stayed its mandate to and including June 22, 1977, by its order dated May 24, 1977. The appropriate order is printed in Appendix A hereto.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## THE QUESTIONS PRESENTED

1. Whether the definition or interpretation of "branch" bank in Section 36(f) of the McFadden Act (12 U.S.C. §36(f)) is dependent on state law or state definitions of branch banking?

2. Whether the federal courts may set aside an administrative nonadjudicatory determination of the Comptroller of Currency that a given banking facility does or does not constitute a "branch" bank as defined in Section 36(f) of the McFadden Act on any ground other than it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"?

3. Whether the principle of competitive equality implicit in the McFadden Act requires that a national bank be limited in the establishment of "branch" banks in a state where a state authorized bank, the largest bank in that state, is permitted to branch without any limitations whatsoever?



## STATUTES INVOLVED

This case involves Section 706 of the Administrative Procedure Act, 5 U.S.C. §706 and Section 36 of the McFadden Act, 12 U.S.C. §36. Sections 6-03-13.1 *et seq.* and 6-09-01 *et seq.* of the North Dakota Century Code are also involved inasmuch as these provisions outline the extent to which state banks within North Dakota are permitted to operate branch banking facilities. Because these provisions are lengthy, their pertinent text is set forth as Appendix E hereto.

## STATEMENT OF THE CASE

### A. Statement of Facts

Prior to 1971, First National[1] operated drive-in and walk-up banking facilities which were physically attached to the Main Bank.[2] The entrance to the drive-in was from Broadway, at that time the main traffic thoroughfare through the downtown business and commercial district of Fargo, North Dakota. However, in 1971, the First National management was faced with the realization that very shortly the drive-in facility would be rendered unusable. Already at that time, the Traffic Bureau of the Fargo Police Department had banned all left turns by motorists using Broadway thus barring entrance to the First National drive-in facility but from one direction. Furthermore, the conversion of Broadway into a pedestrian mall, which would close the street to vehicular traffic, was seriously under consideration at this time.

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[1]Hereafter, "First National" will be used to refer to the First National Bank and Trust Company of Fargo, a defendant and petitioner.

[2]Hereafter, "Main Bank" will be used to refer to First National's primary banking house located at 15 Broadway, Fargo, North Dakota.

Recognizing that it would soon be in an untenable position, First National began searching for a new site for its drive-in facility which would be both economically feasible and conveniently located. A number of potential sites were reviewed, but it was ultimately determined that the only location which would fulfill these requirements was on the corner of Fourth Street South and Main Avenue. This land had already been cleared under an urban renewal project, and the high cost of acquiring and demolishing existing structures was thereby avoided. Moreover, this site was at the intersection of two traffic thoroughfares, each with two-way traffic and, therefore, provided good customer convenience and access.

The physical distance between the property lines of this site and the Main Bank, when measured at its shortest point, is 550 feet. In a direct line, only one intervening structure exists, a seed and grain warehouse located on railroad right-of-way which is expected to be acquired and razed by the City of Fargo in the course of future development programs for downtown Fargo. No private property separates these two plats, the only such property is a dedicated street and a right-of-way owned by the Burlington Northern Railroad.

In 1971, when First National was considering the construction of an alternative drive-in structure, on the above-described site, it had the option of requesting from the Comptroller[3] a determination that this facility could be operated as an extension of the Main Bank or of applying to the Comptroller for a branch banking certificate for the operation of this facility. At this time state law severely

[3]Hereafter, "Comptroller" will be used to refer to James Smith, Comptroller of the Currency at all times relevant to this action and an original defendant.



restricted where drive-in facilities could be constructed by requiring that they be located within fifteen hundred feet of the main banking house. Also, discontinuance of the existing attached drive-in facility, although imminent, had not yet been necessitated. Accordingly, First National felt compelled to apply to the Comptroller for permission to operate a branch at the proposed Fourth Street location. The Comptroller approved this application, and Branch Certificate No. 1642A was issued. Having thus obtained the Comptroller's permission, the Auto Bank[4] was opened and the drive-in facilities attached to the Main Bank were closed. Because of the subsequent developments outlined below, it is the definitional status of this facility which is now in dispute.

In 1973, the 43rd North Dakota Legislative Assembly liberalized the state laws pertaining to drive-in banking facilities which could be built separate and apart from the main banking house. The distance at which such a facility could be built was increased from within 1500 feet of the main facility to anywhere within three miles of the limits of the city containing that facility.

Because of this liberalization of the state branch banking law, First National realized that it was for the first time in a position to construct a branch facility in a service area removed from the core of downtown Fargo. Also, by this time, the drive-in facility which had been at-

[4]Hereafter, "Auto Bank" will be used to refer to First National's drive-in faciilty located at 404 Main Avenue, Fargo, North Dakota. However, the adoption of the separate designation of "Auto Bank" for this structure is not meant to imply that First National regards this structure as a facility separate and apart from the main banking house. Instead, this designation is adopted for the sake of convenience only, it being First National's firm contention that the facility at Main Avenue and Fourth Street is, from a definitional standpoint, merely an extension of the Main Bank operation.

tached to the Main Bank had been completely closed down. Accordingly, First National wrote to the Comptroller requesting that the Auto Bank be designated as an extension of the Main Bank. It was explained to the Comptroller that it was First National's intent to apply for a permit to construct the Southside Branch[5] should this request be granted.

In support of its request, First National submitted for the Comptroller's consideration a number of factors indicating that the Auto Bank was in actuality only an extension of the operations of the Main Bank rather than a separate and distinct operation. These factors are partially set forth in the district court's decision, *Dakota National Bank and Trust Co. v. First National Bank and Trust Company*, 414 F. Supp. 1161, 1167-68 (D.N.D. 1976), and are printed in Appendix G hereto, page 72.

On December 23, 1974, the Comptroller granted First National's request to redesignate the Auto Bank as an extension of the Main Bank. The branch certificate which had been issued for this drive-in facility was returned to the Comptroller and cancelled.

Essentially, in making his determination to characterize and redesignate the Auto Bank as an extension rather than a branch of the Main Bank, the Comptroller had considered, among other things, the distance separating the Auto Bank and the existing Main Bank, the presence or absence of any intervening structures, the presence or absence of any physical connection, the economic effect of the Auto Bank on the balance of competition within the banking community, and the feasibility of placing the

[5]Hereafter, "Southside Branch" will be used to refer to the First National branch facility located at 2737 South University Drive in in Fargo, North Dakota.



Auto Bank closer to the existing Main Bank. No single factor was taken as controlling.

From this information, the Comptroller concluded that First National was unable to continue the drive-in facility which had been attached to the Main Bank due to the conversion of the sole access street into a pedestrian walkway. It was also concluded that the closest feasible location for the relocation of the drive-in facilities was the site upon which the Auto Bank was constructed. Finally, the Comptroller recognized that discontinuance of drive-in services at the Main Bank would subject First National's customers to the inconvenience of "horse and buggy day banking" and would place First National at an obvious competitive disadvantage when compared with other banking institutions in Fargo, all of whom had drive-in facilities located close to or at their main banking houses. Accordingly, the Comptroller determined that the Auto Bank was so closely tied to First National's Main Bank that it constituted an extension thereof rather than a branch separate and apart therefrom. *Dakota National Bank and Trust Co. v. First National Bank and Trust Company*, No. 76-1585, at 4-5 (8th Cir., filed April 14, 1977) (hereafter *"Dakota"*) (quoting an affidavit submitted to trial court by Comptroller explaining the basis for his recharacterization of the Auto Bank).

It is this determination which is, of course, central to the instant litigation, for it provided First National with an opportunity to take advantage of North Dakota's recently liberalized branch banking laws by seeking the establishment of such a branch in an area of south Fargo with virtually no existing banking facilities. Thus, administrative procedures were initiated which ultimately led to

the approval of the branch application for the Southside Branch by the Comptroller and the subsequent opening of the Southside Branch. This facility remains in operation today although its future will, of course, be determined by the outcome of the instant litigation.

### B. History of Litigation

On May 27, 1975, a complaint was filed by Dakota National[6] in United States District Court for the District of North Dakota naming First National and the Comptroller as defendants. Jurisdiction was premised upon 5 U.S.C. §§ 701 *et seq.*, 12 U.S.C. §§ 36 and 94, and 28 U.S.C. §1394. The complaint alleged that the Comptroller's December 23, 1974, cancellation of the Branch Certificate issued for the Auto Bank and the subsequent May 8, 1975, approval of the application to establish the Southside Branch were arbitrary, capricious, and unlawful. Alleging further that it would otherwise sustain irreparable injury, Dakota National prayed that the defendants be permanently enjoined from issuing a branch certificate for and conducting banking operations at the Southside Branch. On June 18, 1976, the motions for summary judgment of both defendants were granted by the district court and Dakota National's action dismissed.

On appeal, the action of the district court was reversed. Judge Donald Ross, writing for the Eighth Circuit, held first that the case presented primarily a question of law, that being the judicial interpretation of the statutory term "branch bank," which in turn was felt to subject the Comptroller's action to de novo review by the district court as well as the appeals court. *Dakota, supra* at 7-10.

[6]Hereafter, "Dakota National" will be used to refer to Dakota National Bank and Trust Co., plaintiff and respondent.



Having thus resolved the threshold question as to the applicable standard of review, the court then reviewed the definitional status of the Auto Bank. Here it was recognized that "the primary determination of whether or not that facility *is* a branch is a matter of federal law." *Id.* at 15 (emphasis theirs). However, the court then conducted an extensive review of the North Dakota statutory language concerning branch banking facilities, and the construction given to this language by the State Banking Commissioner (who as amicus curiae has contested the Comptroller's actions thus far in these proceedings). From this review it was concluded that the Auto Bank constituted a branch and that First National was therefore impermissibly operating two such facilities in violation of state and, through incorporation, federal law. *Id.* at 18.

Finally, the court rejected First National's contention that it should consider the unique situation confronting national banks operating in the State of North Dakota inasmuch as this State has the Bank of North Dakota, an institution with unlimited branch banking powers and therefore with the potential for tremendous competitive advantage over national banks. In dismissing these concerns, the court held that the Bank of North Dakota did not constitute a "state bank" under the terminology of the McFadden Act, 12 U.S.C. §36(h). *Id.* at 19-20.

## REASONS FOR GRANTING THE WRIT

1. *The Decision Below Failed to Follow this Court's Decisions as to the Proper Interpretation of "Branch" Bank as that Term is used in Section 36(f) of the McFadden Act and Conflicts with Decisions of other Courts of Appeals on the Issue.*

The role of state law in the threshold determination of *what* constitutes a "branch" facility as that term is defined in 12 U.S.C. §36(f) was settled in *First National Bank v. Dickinson*, 396 U.S. 122 (1969) where this Court stated:

> We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes 'branch' must control the content of the federal definition of Section 36(f). Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank supra*, for in §36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in §36 of a general definition of 'branch'. On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned 'the two ideas shall compete on equal terms and only where the States make the competition possible by [allow] their own institutions [to] have branches.' In short, the definition of 'branch' in §36(f) must not be given a restrictive meaning which frustrate the congressional intent this Court found to be plain in *Walker Bank, supra*. *Id.* at 133-34.

Numerous lower courts have followed this language by holding that state law or state definitions play no role in the preliminary determination of what constitutes a branch.



*See, e.g., Independent Bankers Association v. Smith*, 534 F. 2d 921, 933 (D.C. Cir. 1976), *cert. denied*, — U.S. — (1977); *Central Bank v. Smith*, 532 F. 2d 37, 38 (7th Cir.), *cert. denied*, 97 S. Ct. 257 (1976); *North Davis Bank v. First National Bank*, 457 F. 2d 820, 822-23 (10th Cir. 1972); *Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank*, 380 F. Supp. 568, 575 (W.D. Vir. 1974), *aff'd*, 515 F. 2d 154 (4th Cir.) *cert. denied*, 423 U.S. 869 (1975).

However, the Eighth Circuit has taken a different approach to the determination of "what" constitutes a branch bank. Rather than limiting itself solely to federal law, that court has made extensive utilization of state law provisions. In *Nebraskans for Independent Banking, Inc. v. Omaha National Bank*, 530 F. 2d 755 (8th Cir. 1976), the court held:

> While the language [of 12 U.S.C. §36(c)] is somewhat ambiguous concerning the extent to which state law should be used to *define* branch banking, the Supreme Court's recognition of Congress' paramount policy of fostering competitive equality in the McFadden Act mandates that, in determining whether a national bank facility is a branch, *prime consideration* must be given to whether a state bank would be allowed to maintain one like it in the circumstances. *Id.* at 760 (emphasis added).

Accordingly, in *Nebraskans* the Eighth Circuit relied heavily upon regulations promulgated by the Nebraska Department of Banking and upon an opinion of the Nebraska Director of Banking in deciding whether or not the

facility under review in that case constituted a "branch" under federal law.[7]

Likewise, in the instant case, the court placed heavy emphasis upon North Dakota statutory provisions governing branch banking[8] and upon an opinion from the State Bank Commissioner[9] in holding that the Auto Bank facility constituted a branch. *Dakota, supra* at 13-18. As an indication of the extent of this reliance, the court stated the following with regard to the Commissioner's opinions:

[7]A writ of certiorari was granted in *Nebraskans*. However, a subsequent change in the branch banking law of Nebraska prevented this Court from deciding upon the correctness of the approach taken by the Eighth Circuit in that case. *Nebraskans for Independent Banking, Inc. v. Omaha National Bank*, 530 F.2d 755 (8th Cir.), *vacated and remanded*, 426 U.S. 310 (1976). The resolution of this issue is no less appropriate here.

[8]Two North Dakota statutes regarding branch banking were quoted by the circuit court. These statutes, N.D.C.C. §§ 6-03-13.1 and -13.2, are repeated in Appendix E hereto.

These provisions provide little by way of a state definition of the term "branch". By implication, a branch facility is a facility "separate and apart" from the main banking house. N.D.C.C. § 6-03-13.1. In discussing the federal definition of "branch" contained in 12 U.S.C. §36(f) this Court has concluded that Congress envisioned facilities built "apart from the chartered premises". *First National Bank v. Dickinson*, 396 U.S. 122, 135 (1969). This language in turn has been construed by various lower courts as the primary basis for distinguishing between extensions of existing facilities and the establishment of separate branch banks. *See, e.g., Dunn v. First National Bank*, 345 F. Supp. 853, 857 (N.D. Ga. 1972); and *Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank*, 380 F. Supp. 568, 572 (W.D. Vir. 1974), *aff'd*, 515 F.2d 154 (4th Cir.), *cert. denied*, 423 U.S. 869 (1975). Accordingly, North Dakota's statutory definition of the term "branch" is operatively identical to the federal counterpart. Therefore, even should the state definition be relevant to the consideration of "what" constitutes a branch under federal law, it is hard to see how this consideration should alter the outcome of the instant case.

[9]The State Banking Commissioner has hardly played a nonpartisan role in this controversy from its inception. Not only did the Commissioner write to the Comptroller in opposition to the granting of a branch banking certificate for the Southside Branch, but the State Banking Board on which he presides has appeared as amicus curiae in opposition to First National's positions at both the trial court and appellate court level.



> The State Commissioner's view, supported in this Court by the State Banking Board, that First National would be impermissibly operating two separate and apart facilities, supports our similar conclusion. And '[w]hile the state director's view is not dispositive, it is certainly illuminating on the extent to which a state bank could extend its operation under . . . [state] law. . . .' *Id.* at 17-18.

Therefore, with regard to the role of state law in the threshold determination of what constitutes a branch bank under the McFadden Act, the Eighth Circuit has reached a conclusion in conflict with the decisions of other courts of appeals.[10] It has also decided this question in a manner in conflict with the language of this Court in *Dickinson, supra* at 133-34. By referring to state statutory provisions, and more particularly to the opinion of the State Banking Commissioner, the circuit court has permitted the very result this Court warned against in *Dickinson*. By allowing the State, acting through its banking commissioner, to define the content of the term "branch" the circuit court has made this State the sole judge of its own powers.

2. *The Decision Below Failed to Follow the Proper Standard for Federal Judicial Review of Administrative Decisions of the Comptroller of Currency Established by this Court in Camp v. Pitts.*

This Court, in *Camp v. Pitts*, 411 U.S. 138 (1973),

[10]In *Nebraskans* the Eighth Circuit acknowledged this conflict. The majority opinion contains a footnote stating that an opinion from the Fourth Circuit "underated the influence of state law definitions of branching". *Nebraskans for Independent Banking, Inc. v. Omaha National Bank*, 530 F.2d 755, 761 n. 4 (8th Cir. 1976). Furthermore, three judges felt compelled to write or join in separate opinions expressly stating their opposition to the majority's position on the role of state law. *Id.* at 764-67 (Lay, J., concurring) (Webster & Henley, JJ., dissenting).

established the standards for judicial review under the Administrative Procedure Act (5 U.S.C. §706) of decisions of the Comptroller of Currency.

In *Camp* the respondent had appealed from a decision of the Comptroller denying respondent's application to establish a new national bank in Hartsville, South Carolina. No formal adjudicatory hearing had ever been held by the Comptroller on the application. Instead, he had simply written to the respondent indicating that there was no necessity for the creation of a new bank. This Court held that under these facts the Comptroller's actions could not be set aside unless found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 142. It was further held that de novo review was appropriate only when there are "inadequate fact finding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions" and that the "substantial evidence" test should only be applied when reviewing findings "made on a hearing record." *Id.* at 141-42. An examination of the administrative determination under review in this case clearly demonstrates that *Camp* should have been found to be controlling by the circuit court.[11]

The request for redesignation of the Auto Bank was

[11]The Eighth Circuit identified the administrative determination under review in the following manner:

> First, it should be clarified which issues are not presented by this appeal. The district court did not decide, and we do not here, the propriety of establishing a branch bank on University Drive; nor does either party contest the fact that the proposed facility would constitute a *branch* as a mater of federal law and would require certification as such. What is contested is the legality of that branch in view of the existence of the 404 Main Avenue Auto Bank facility which, from appellants viewpoint, constitutes the one and only branch authorized by North Dakota law. *This Court is, then primarily concerned with the recharacterization of the Auto Bank from branch to extension, for it is that question which ultimately determines the legal status of the newest facility in south Fargo.*

*Dakota National Bank and Trust Co. v. First National Bank and Trust Company of Fargo*, No. 76-1585, at 6 (8th Cir., filed April 14, 1977) (emphasis added).



first made in a July 25, 1974 letter from First National to the Comptroller. *See* Appendix F hereto. On August 8, 1974, a meeting was held between Richard J. Blanchard, Deputy Comptroller, First National's President, and its attorney. At this meeting, additional information was requested by the Comptroller. This information was compiled by First National and forwarded to the Comptroller on August 15, 1974. *See* Appendix G hereto. The submission of these documents completed the record reviewed by the Comptroller before making his determination that First National's Auto Bank could be redesignated and continued in operation as an extension of the Main Bank. No adjudicatory proceedings providing the basis for a de novo review were ever held. Likewise, no hearings were held to support an application of the substantial evidence test.

In his decision, the Comptroller referred to the statutory definition of the term "branch" in Section 36(f) of the McFadden Act, 12 U.S.C. §36(f) (1970) and the judicial gloss thereon.[12] Then the Comptroller proceeded to apply this federal definition to the instant facts, concluding:

[12]12 U.S.C. § 36(f) (1970) provides:

> Any branch bank, branch office, branch agency, additional office, or any branch place of business located in any state or territory of the United States or in the District of Columbia at which deposits are received, checks paid, or money lent.

This definition was supplemented in *First National Bank v. Dickinson*, 396 U.S. 122, 135 (1969) where this Court stated:

> The term 'branch banking' at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises. . .

(a) First National was unable to continue to provide drive-up service for its customers at its main office in 1971 because of urban renewal plans to turn the sole access street into a pedestrian walkway;

(b) Discontinuation of drive-up service would subject First National's customers to the inconvenience of "horse and buggy day banking" after they had become accustomed to the convenience and efficiency of the drive-up service now routinely provided by banks throughout the nation.

(c) Physical modifications to the existing main office premises to provide drive-up service were unfeasible;

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Following the guidance thus provided by Congress and this Court, various lower courts have given substance to these purposely skeletal definitions through the adoption of a number of factors to be utilized in the factual determination of whether or not a branch bank exists. *See, e.g., Jackson v. First National Bank*, 246 F. Supp. 134, 139 (M.D. Ga.), *rev'd on other grounds*, 349 F.2d 71 (5th Cir. 1965); *Dunn v. First National Bank*, 345 F. Supp. 853, 856 (N.D. Ga. 1972); *North Davis Bank v. First National Bank*, 457 F.2d 820, 824 (10th Cir. 1972) (by implication); *Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank*, 380 F. Supp. 568, 572 (W.D. Vir. 1974), *aff'd*, 515 F.2d 154 (4th Cir.), *cert. denied*, 423 U.S. 869 (1975); and *Nebraskans for Independent Banking, Inc. v. Omaha National Bank*, 530 F.2d 755, 761 (8th Cir.), *vacated and remanded*, 426 U.S. 310 (1976).

Although downplaying their importance, the Eighth Circuit well summarized these factors in *Nebraskans, supra*, in the following manner:

> They include (1) the distance separating the main bank from the added facility; (2) the presence or absence of intervening structures; (3) the physical connection, if any, between the main bank and the facility; (4) the effect upon the balance of competition (that is, whether the facility expands in a material way customer access to banking services in a location not previously served so as to give a material competitive advantage in securing customers); (5) the availability of other locations for attached expansion; and finally (6) the dependence of the facility upon the main bank in day-to-day banking operations. *Id.*



(d) No other property contiguous to First National's Main office premises was available for expansion;

(e) The only reasonably available premises upon which First National could continue to provide drive-up service to its customers was a tract of land located approximately 550 feet (168 meters) from the existing main office premises, and, out of necessity, this was purchased for the purpose of relocating the unusable drive-up installation;

(f) The only intervening structure at ground level was a building scheduled to be razed pursuant to urban redevelopment plans;

(g) The only intervening property was a railroad easement and a dedicated street;

(h) The drive-up installation would continue to provide limited service to First National's existing customers in the main office service area;

(i) All transactions entered into at the drive-up installation would be processed at the main office;

(j) The drive-up installation would be completely dependent upon the main office and could function only in conjunction with the main office to enable First National to continue to provide modern, convenient service to its existing customers; and

(k) The operation of the drive-up installation had resulted in no injury to any of First National's competitors and had not affected the competitive balance in the market.

6. In determining whether an additional installation adjunctive to an existing main office, amounts

to the establishment of a branch or merely an extension of the existing main office premises, the Comptroller of the Currency examines all of the facts and circumstances surrounding the additional installation.

7. The factors weighed by the Comptroller of the Currency include, but are not limited to, the distance separating the additional and existing installations, the presence or absence of any intervening structures, the presence or absence of any physical connection, the economic effect of the additional installation upon the balance of the competition within the banking community, and the feasibility of placing the additional installation closer to the existing office. No single factor is controlling. *Dakota, supra* at 4-5.

From the above, it should be apparent that the Comptroller's decision at issue here was "in accordance with the law" as required by *Camp*. Thus, the only issue was whether the Comptroller's application of the law to the facts was "arbitrary, capricious, or an abuse of discretion."

The answer to this question should be obvious from the above recital of the controlling facts regarding the facility, for the Comptroller followed the applicable law in its entirety.

The Eighth Circuit, however, circumvented and avoided the limitations imposed by this standard by characterizing the Comptroller's determination as one primarily of law. In so doing the court erred and strayed impermissibly from this Court's holding in *Camp*. When the Eighth Circuit thus failed to distinguish between the Comptroller's legal and factual determinations and instead characterized the entire decision as one of law, it removed itself from the restraints placed upon its judicial review power by Congress and this Court. The circuit



court has thereby frustrated the broad discretionary powers that Congress sought to vest in administrative agencies through enactment of the judicial review section of the Administrative Procedure Act, 5 U.S.C. §706 (1970). Such a departure from the accepted and usual course of judicial proceedings should not go unreviewed by this Court.

3. *The Decision Below Failed to Follow this Court's Decisions Adopting the Principle of Competitive Equality in Branch Banking and Allowing National Banks to Branch Where State Banks May Do So.*

The legislative history of the McFadden Act is extensively summarized in *First National Bank v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966). Briefly, beginning in the 1920's, increasing concern began to be voiced over the possibility that the unchecked branch banking being conducted by state banks would cause the destruction of the national banking system. Therefore, legislation was introduced and eventually passed which was designed to equalize state and national branch banking by allowing national banks to establish branch banks under the same circumstances as their state counterparts. The Act took its name from that of its principal sponsor, Representative McFadden, who once characterized the product of his efforts in the following manner:

> As a result of the passage of this Act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and *competitive equality* has been established among all member banks of the Federal Reserve System. *Id.* at 258 (emphasis theirs).

These remarks of Congressman McFadden, together with those of his contemporaries and predecessors, establish that it was the intent of Congress to place national and state banks in a status of "competitive equality" with regard to branch banking. In other words, the extent to which national banks will be permitted to engage in branch banking is determined by the respective state branch banking laws. Id. at 497. *See also, Dickinson, supra* at 130.

In its opinion, the Eighth Circuit, as had the district court below, dismissed petitioner's profound concerns about the competitive advantage afforded the Bank of North Dakota through its enacting legislation. This legislation, repeated in Appendix E hereto, places no limitations upon the branching powers of the Bank of North Dakota and there can be no assurances that such branches will not be forthcoming. Furthermore, the Bank of North Dakota is a tremendously successful institution, holding more deposits than any other bank, be it state or federal, in North Dakota.

It cannot be denied that this bank is unique and that it is afforded privileges not provided to the state's more conventional state banking institutions. However, this uniqueness does nothing to detract from the Bank of North Dakota's competitive ability. In fact, this institution has been so successful that even should the portion of its deposits that have been placed there by the State of North Dakota be disregarded, it still would have total assets in excess of those held by any other banking institution within this state. The Bank of North Dakota presently has total assets in excess of $500 million dollars. By comparison, First National has total assets of slightly more than $100 million dollars. Add to this the fact that under the circuit court's ruling, the Bank of North Dakota alone, among all the banks in this state, would be permitted unlimited branch banking powers, and it becomes obvious that this institution is afforded a tremendous competitive advantage at the direct expense of all other banks within this state.



The North Dakota Legislature has chosen to create two separate classes of banks and has further chosen to vest one class with unlimited branching powers. National banks should not be arbitrarily restricted to the limited branching powers given to the more restricted class. Such forced limitations would result in a form of inverse competitive advantage implicitly abhorrent to the policies behind the McFadden Amendments.[13]

Because of the profound effects of this situation upon national banks operating in North Dakota, the resolution of the federal legal issues presented thereby should be determined by this Court.

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[13]The circuit court argues in its opinion that to place federal banks on equal footing with the Bank of North Dakota would in turn be to place all other state banks at a competitive disadvantage with regard to the former institutions. However, the court forgets that this dichotomy is a creature of the North Dakota Legislative Assembly. That body created the disparity and that body alone can dissolve it. However, until such time as the Legislature chooses to elevate the branch banking powers of conventional state banks to those of the Bank of North Dakota, or conversely to restrict the powers of the Bank of North Dakota to those now held by conventional state banks, it is submitted that national banks should not be arbitrarily held in a position of competitive disadvantage. The simple reality is that the Bank of North Dakota exists and that it actively competes with national and other state banks. Therefore, if national banks such as the petitioner are to be kept in a position of competitive equality with regard to this institution, they must be afforded the same branching powers it now enjoys. If this in turn places the more conventional state chartered banks at a competitive disadvantage, the situation is properly one which must be remedied by the Legislature, not by the courts.

## CONCLUSION

The decision below presents this Court with a number of reasons for exercising its discretion by granting the requested writ of certiorari. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

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Dakota National Bank and Trust Co., etc.,

Appellant,

vs.

First National Bank and Trust Company of Fargo, etc., et al.,

Appellees.

---

Appeal from the United States District Court for the District of North Dakota

September Term, 1976

76-1585

Stay of mandate is hereby granted in this cause to and including June 22, 1977.

May 24, 1977.

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## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

Dakota National Bank and Trust Co., etc.,
Appellant,

vs.

First National Bank and Trust Company of Fargo, etc.,
Appellees.

---

Appeal from the United States District Court for the District of North Dakota

September Term, 1976

76-1585

The Court having considered petition for rehearing en banc filed by counsel for appellee First National Bank of Fargo and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Judge Bright did not participate in the consideration of the petition for rehearing with suggestions for rehearing en banc.

May 16, 1977.

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## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

Dakota National Bank and Trust Co., a National Banking Association,
Appellant,

vs.

First National Bank and Trust Company of Fargo, a National Banking Association, and James Smith, Comptroller.
Appellees.

---

Appeal from the United States District Court for the District of North Dakota

No. 76-1585

---

Submitted: January 14, 1977

Filed: April 14, 1977

Before LAY and ROSS, Circuit Judges, and WANGELIN, District Judge.*

ROSS, Circuit Judge.

This appeal again presents to the court a question of the proper construction of 12 U.S.C. §36, the branch banking law. Dakota National Bank & Trust Co. (Da-

*H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, sitting by designation.

kota National) initiated this action to protest a decision of the Comptroller of the Currency to award the First National Bank and Trust Company of Fargo (First National) a branch certificate for its newly proposed branch facility at University Drive and Twenty-eighth Avenue in the city of Fargo. From an adverse decision by the district court sustaining the Comptroller, Dakota National appeals to this court.

*The Facts.*

First National and Dakota National both maintain a main banking house in Fargo, North Dakota, respectively at 15 Broadway and 51 Broadway in that city. Dakota National also operates a branch authorized by the Comptroller at 1501 South University Drive. The legality of First National's proposed University Drive location is brought into question by Dakota National because First National also maintains the "Auto Bank" at 404 Main Avenue, which had previously operated as a certified branch and which, Dakota National contends, constitutes the one and only lawful branch permitted by North Dakota law.

According to the administrative files of the Comptroller of the Currency which were submitted by the plaintiff, First National made application on September 14, 1971, for permission to operate a "branch" bank drive-in facility at Main Avenue and Fourth Street South at a distance of 1,075 feet from the main banking facility. The application stated that First National's present drive-in facility, which was then a part of the main office, was "in serious jeopardy due to imminent prohibition of left-turns by vehicle traffic from Broadway and the eventual curtailment of all vehicular traffic on Broadway." The investigative report on



the branch application compiled by the office of the Regional Administrator of National Banks discloses that proposed services at the Auto Bank were to include, among other things, deposits and withdrawals from checking and savings accounts. North Dakota state branching laws, the substantive provisions of which are applicable to national banks as well, at that time allowed a bank to "maintain and operate *separate and apart from its banking house one facility for drive-in and walk-up service,* whereat the services rendered shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank." N. D. Cent. Code §6-03-13.1 (emphasis added). The facility was required to be no more than 1,500 feet from the main banking house. N. D. Cent. Code §6-03-13.2. The First National gave published notice of its intention to establish a branch, and on October 27, 1971, the bank was notified that its "application to establish a branch," the Auto Bank, had been approved by the office of the Comptroller.

The Auto Bank branch opened for business in 1972 and operated as a branch until 1974, when, on July 25, 1974, First National's president submitted a proposal to the Comptroller to have the Auto Bank *recharacterized* as an "extension" of the main bank, rather than a certified "branch." The bank president cited as reasons for the change, *inter alia,* the fact that the only structure separating the main and Auto Bank was a seed warehouse located on a railroad right-of-way; that at the time the Auto Bank was constructed "economics and customer convenience" required that it not be closer to the main banking house; and, finally, that only "*550 feet*" separated the auto and

main bank facilities.[1] In an *ex parte* decision on December 23, 1974, the Comptroller gave his concurrence, the branch was recharacterized as an extension, and the First National relinquished its auto branch certificate.

In an affidavit submitted to the district court pursuant to cross summary judgment motions, Deputy Comptroller Blanchard recounted the reasons for which his permission was given:

> (a) First National was unable to continue to provide drive-up service for its customers at its main office in 1971 because of urban renewal plans to turn the sole access street into a pedestrian walkway;
>
> (b) Discontinuation of drive-up service would subject First National's customers to the inconvenience of "horse and buggy day banking" after they had become accustomed to the convenience and efficiency of the drive-up service now routinely provided by banks throughout the nation;
>
> (c) Physical modifications to the existing main office premises to provide drive-up service were unfeasible;
>
> (d) No other property contiguous to First National's main office premises was available for expansion;

[1]The discrepancy in distance between the two buildings apparently results from the method employed in making the measurement. According to the trial court "[i]f measured in a straight line, the distance is approximately 550 feet. Plaintiff would measure the distance as approximately 1250 feet by following the usual route of travel between the two points." *Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co.*, 414 F.Supp. 1161, 1172 n.7 (D.N.D. 1976).



> (e) The only reasonably available premises upon which First National could continue to provide drive-up service to its customers was a tract of land located approximately 550 feet (168 meters) from the existing main office premises, and, out of necessity, this was purchased for the purpose of relocating the unusable drive-up installation;
>
> (f) The only intervening structure at ground level was a building scheduled to be razed pursuant to urban redevelopment plans;
>
> (g) The only intervening property was a railroad easement and a dedicated street;
>
> (h) The drive-up installation would continue to provide limited service to First National's existing customers in the main office service area;
>
> (i) All transactions entered into at the drive-up installation would be processed at the main office;
>
> (j) The drive-up installation would be completely dependent upon the main office and could function only in conjunction with the main office to enable First National to continue to provide modern convenient service to its existing customers; and
>
> (k) The operation of the drive-up installation had resulted in no injury to any of First National's competitors and had not affected the competitive balance in the market.

6. In determining whether an additional installation, adjunctive to an existing main office, amounts to the establishment of a branch or merely an extension

of the existing main office premises, the Comptroller of the Currency examines all of the facts and circumstances surrounding the additional installation.

7. The factors weighed by the Comptroller of the Currency include, but are not limited to the distance separating the additional and existing installations the presence or absence of any intervening structures, the presence or absence of any physical connection, the economic effect of the additional installation upon the balance of the competition within the banking community, and the feasability of placing the additional installation closer to the existing office. No single factor is controlling.

Meanwhile, in 1973 the North Dakota legislature amended its branch banking law to permit a branch to locate within the *corporate city limits* of the main banking house or within *three miles* of such city if it were not within the corporate limits of another city. N. D. Cent. Code §6-03-13.1 (1975). Concluding that it was operating without a separate facility after the recharacterization of the Auto Bank on December 23, 1974, First National made application on December 26, 1974, to establish a *branch* bank on University Drive.

The State Commissioner of Banking learned of the application and responded by writing to the Regional Administrator of National Banks on January 24, 1975, expressing the opinion that the proposed branch would violate federal law, and state law, which "specifically limits that only one facility separate and apart from its banking house is authorized." Dakota National Bank also announced its opposition and on February 6, 1975, re-



quested a hearing in connection with the application; the hearing request was granted by the office of the Regional Administrator on February 10, 1975.

At the February 28 hearing, which was conducted pursuant to rules in 12 C.F.R. §5, Mr. Elder, counsel for the Regional Administrator, announced that the hearing would be limited to "the presentation of factual matters concerning the subject branch. It is not the purpose * * * to air legal issues * * *." Though most of the hearing, through both parties' presentations, was devoted to economic issues and the propriety of a bank branch in the south Fargo area, Dakota National was permitted, over First National's relevancy objection, to present some evidence concerning the Auto Bank and its recharacterization by the Comptroller as an extension. In May 1975 the Deputy Comptroller approved First National's University Drive branch application, and subsequently in February 1976 Dakota National, seeking injunctive and declaratory relief against the Comptroller and First National, filed suit in federal district court, arguing that the Comptroller's approval of First National's application was "arbitrary, capricious and unlawful," and requesting the district court to determine the "legality of the proposed First National branch facility in south Fargo." The district court subsequently dismissed Dakota National's petition. We reverse.

*Standard of Review.*

An initial question for the court concerns the district court's use of the "arbitrary and capricious" standard of review of the Comptroller's order, and the appellees' argument for its use by this court.

First, it should be clarified which issues are not pre-

sented by this appeal. The district court did not decide, and we do not here, the propriety of establishing a branch bank on University Drive; nor does either party contest the fact that the proposed facility would constitute a *branch* as a matter of federal law and would require certification as such. What is contested is the legality of that branch in view of the existence of the 404 Main Avenue Auto Bank facility which, from appellant's viewpoint, constitutes the one and only branch authorized by North Dakota law. This court is, then, primarily concerned with the recharacterization of the Auto Bank from branch to extension, for it is that question which ultimately determines the legal status of the newest facility in south Fargo.

In determining the legal status of the Auto Bank, including a judicial interpretation of the term "branch" bank, 12 U.S.C. §36(f), we are confronted *primarily* with a question of law, which if incorrectly decided in an earlier stage of the proceedings, is subject to correction in an appeal to this court. *Dunlop v. Haybuster Manufacturing Co. & Occupational Safety & Health Review Commission,* 524 F.2d 222, 224 (8th Cir. 1975). The district court relied on the Supreme Court opinion, *Camp v. Pitts,* 411 U.S. 138 (1973) in holding that the "arbitrary and capricious" standard of review was applicable to the factual determinations which the Comptroller has made in this case and to matters which are committed to the Comptroller's discretion. In *Camp v. Pitts, supra,* 411 U.S. 138 the Court was reviewing the Comptroller's denial of an application to establish a new bank. The Comptroller had found, as a factual conclusion, that a new bank would be "an uneconomic venture in light of the banking needs and



the banking services already available in the surrounding community." *Camp v. Pitts, supra,* 411 U.S. at 143. The Supreme Court held that the appropriate standard of review was whether that discretionary determination was "arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with the law* * * *." *Camp v. Pitts, supra,* 411 U.S. at 142 (emphasis added).

However, in the present case we are concerned primarily with a determination of law.[2] Questions of law such as the one in this case, which involve the judicial interpretation of the statutory term "branch bank," may be reviewed *de novo* by both the district court and the appeals court. The Ninth Circuit made this distinction in regard to questions of law in *Seattle Trust & Savings Bank v. Bank of California,* 492 F.2d 48 (9th Cir. 1974).

> We consider first the question raised concerning the proper standard of judicial review of the Comptroller's decision. Although this issue was not clearly presented or determined in the trial court, it does appear from the record that the District Court adopted the view urged by the Bank of California and the Comptroller that the Courts should uphold the Comptroller's administrative ruling unless he acted "unreasonably, arbitrarily and capriciously" in construing applicable statutes. Although this standard apparently was applied by the District Court, *we deem the proper standard of review to have been a de novo determination of the legal issues involved*

[2]The "substantial evidence test" and the "arbitrary and capricious standard" of 5 U.S.C. § 706 "[b]oth are used for review of findings of fact * * * ." K. Davis, ADMINISTRATIVE LAW OF THE SEVENTIES § 29, at 647 (1976).

*herein.* We consider the determination in the trial court to have accomplished a result entirely consistent in approach and result with the de novo review requirement.

*The arbitrary and capricious standard has been judicially fashioned to protect against the wrongful exercise of discretion by the Comptroller regarding factual controversies.* In this case, however, the principal issue was whether the Comptroller has acted within the limitations imposed upon him by federal and state law, not whether he has acted reasonably or unreasonably. *If the Comptroller was incorrect in his interpretation of the law, he should have been overruled in the District Court.* First National Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252, 87 S. Ct. 492, 17 L. Ed.2d 343, reh. den., 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 60 (1966). This standard of review has been customarily applied to cases involving interpretation of 12 U.S.C.A. §36(c). *See* First National Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1966).[3]

[3]*Mid-West Nat'l Bank v. Comptroller of Currency,* 296 F.Supp. 1223 (N.D. Ill. 1968) a branch banking case which was cited by the *en banc* opinion of the court in *Nebraskans for Independent Banking v. Omaha Nat'l Bank,* 530 F.2d 755, 761 (8th Cir. 1976), *vacated and remanded,* 44 U.S.L.W. 3700 (U.S. June 7, 1976), held:

> Determinations of such legal issues do not involve the exercise of discretion, unlike issues within the Comptroller's peculiar expertise in the field of banking. Since legal issues are here in dispute, the Court, in effect, must review them *de novo,* paying due regard to any factual determinations made by the Comptroller in reaching his decision, and the record which was before him.

*Id.* at 1226.



*Id.* at 50 (emphasis added).

Therefore, we will examine the legal questions presented by this appeal *de novo,* "paying due regard to any factual determinations made by the Comptroller in reaching his decision, and the record which was before him." *Mid-West National Bank v. Comptroller of Currency,* 296 F.Supp. 1223, 1226 (N.D. Ill. 1968).

*Branch Banking.*

*First National Bank v. Dickinson,* 396 U.S. 122, 134 (1969) established that the definition of a branch bank is a threshold question to be determined as a matter of federal law. Two elements comprise the federal definition of branch bank as outlined by the Court in *First National Bank v. Dickinson, supra,* 396 U.S. 122; they relate generally to (1) the *types of services* offered and (2) to the *location* of a facility.

The Supreme Court's judicial construction of "branch" emanates from the federal statute which provides:

> (f) the term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent.

McFadden Act, 12 U.S.C. §36(f).

Recognizing that the definition suggests a calculated indefiniteness as to the outer limits of the term, the Supreme Court has concluded that at the very least the federal definition will include any place for receiving deposits or paying checks or lending money apart from the chartered

premises. *First National Bank v. Dickinson, supra,* 396 U.S. at 135. Since the "services offered" element of the definition is written in the disjunctive, the offering of any one of the three services will provide the basis for finding that "branch" banking is taking place. This interpretation is undoubtedly in line with legislative intent. In his analysis of §36(f) at the time of its enactment Representative McFadden explained:

> [Section 36(f)] defines the term "branch." *Any place outside of or away from the main office* where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office,* is a branch if it is legally established under the provisions of this act.

*Independent Bankers Association v. Smith,* 534 F.2d 921, 931 (D.C. Cir. 1976), *cert. denied,* 45 U.S.L.W. 3253 (U.S. Oct. 4, 1976), *quoting* 68 Cong. Rec. 5816 (1927) (footnote omitted) (emphasis added). It is undisputed, and the district court so notes, "that deposits are received and checks paid at the 4th and Main facility," an admission which easily places the facility within the first half of the broad federal equation. In decisions since this court's *en banc* decision on branch banking, *Nebraskans for Independent Banking v. Omaha National Bank,* 530 F.2d 755 (8th Cir. 1976), *vacated and remanded,* 44 U.S.L.W. 3700 (U.S. June 7, 1976), our court has concluded that the part of the definition relating to "services offered" applies equally to *machines* that are "capable of receiving deposits and crediting the amount deposited," *Missouri ex rel. Kostman v. First National Bank,* 538 F.2d 219,



220 (8th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3345 (U.S. Nov. 8, 1976), and *trust account services* offered at a separate facility where it was "apparent that these enumerated activities are also carried on routinely at Mercantile's main office." *St. Louis County National Bank v. Mercantile Trust Co.,* 548 F.2d 716, 719 (8th Cir. 1976). "This alone would clearly bring Mercantile's Clayton office within the branch definition as declared by Representative McFadden's own analysis of section 36(f) at the time of its adoption." *Id.* The Supreme Court has spoken less definitely as to when a facility, as a matter of federal law, is "apart from the chartered premises." In *First National Bank v. Dickinson, supra,* 396 U.S. at 122, where customers of a national bank could deliver sums of money to an armored truck or a stationary receptacle, the Court concluded that "[s]ince the putative deposits are *in fact* 'received' by a bank facility *apart from its chartered place of business,* we are compelled, in construing §36(f), to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an 'additional office, or . . . branch place of business . . . at which deposits are received.' " *Id.* at 137 (footnote omitted) (emphasis added).

More specifically, this circuit was confronted with a strikingly similar set of facts in the *Nebraskans* case, *supra,* which we find controlling here. *As a matter of law* the Omaha National Bank facility was found to be "apart from the chartered premises":

> It is undisputed that deposits are received and checks paid at the 18th and Douglas facility, and Omaha National concedes that loan applications are accepted

there as well. Further, it cannot be seriously disputed that a free-standing facility located around the corner, one block up and across the street from the main bank's south entrance on Farnam Street, even if connected by a pneumatic tube, is one located "apart from the chartered premises" as a matter of law. The bank's main entrance is yet further from the facility, around two corners on 17th Street to the east. There is no west entrance directly into the main bank from 18th Street for the reason that the bank on the ground floor is located only in the east half of the Woodmen Tower lobby.

*Nebraskans for Independent Banking v. Omaha National Bank, supra,* 530 F.2d at 763 (footnote omitted).

The facts in this case are even more compelling for concluding that the facility is "separate and apart" from the main banking house. According to the district court it is not disputed that the facility is free standing; the Auto Bank is located some two blocks distant from the main bank. Unlike the *Nebraskans* case, not even a pneumatic tube connects the main bank and the Auto Bank. The district court found that "the *only* physical connection between the Auto Bank and the main office is a direct telephone line." (Emphasis added.) The district court and the Comptroller, nevertheless, concluded that the Auto Bank was an "extension" and not a branch bank by relying on a list of six judicially conceived "factors" for identifying a branch.[4] The role of these six factors was, however, greatly

[4] "The cases considering the factual question whether a given national bank facility is a 'branch' have identified the number of factors to be assessed in making the determination. They include (1) the distance separating the main bank from the added facility; (2) the present or absence of intervening structures; (3) the physical connection, if any, between the main bank and the facility; (4) the effect upon the balance of competition (that is, whether the facility expands in a material way customer access to banking services in a location not previously served so as to give a material competitive advantage in securing customers); (5) the availability of other locations for attached expansion; and finally (6) the dependence of the facility upon the main bank in day-to-day banking operations." *Nebraskans, supra* at 760-761 (Footnote omitted).

*Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., supra.* 414 F.Supp. at 1172.



limited in the *Nebraskans* case and subordinated there to the *statutory definition* of *branch* and the *principle of competitive equality. Nebraskans for Independent Banking v. Omaha National Bank, supra,* 530 F.2d at 761.[5] This court has called these factors only aids to the fact-finder; they are certainly not decisive in light of the primary sources of the definition.

The doctrine and policy of competitive equality is firmly imbedded in the Act and therefore relevant to the construction of its terms and the application of its provisions.

[5] The Eighth Circuit opinion in *Nebraskans for Independent Banking v. Omaha National Bank, supra,* 530 F.2d 755, was vacated by the Supreme Court on June 7, 1976, 44 U.S.L.W. 3700 (U.S. June 7, 1976), in light of new state legislation which redefined the auxiliary teller facilities which a state bank may operate. Legislative Bill 763 provided that "any bank may maintain an attached auxiliary teller office, if such teller office is physically connected by a pneumatic tube or tubes, or a walkway, tunnel, or any other mechanical or structural connection or attachment for the public use of the bank and is within two hundred feet of the building containing the premises specified as its place of business in its charter and is not within three hundred feet of another bank or another bank's auxiliary or detached teller office."

The Supreme Court may have felt the *branch* would no longer be a "detached" facility as a matter of *state law.* In *First Nat'l Bank v. Dickinson,* 369 U.S. 122, 133 (1969) the Court said: "[t]he mechanism of referring to state law is simply one designed to implement that congressional intent [competitive equality] and build into the federal statute a self-executing provision to accommodate to changes in state regulation."

On November 30, 1976, the Nebraska district court (Judge Robert V. Denney) invalidated this new Nebraska legislation on grounds not pertaining to the branch banking question.

Through that doctrine Congress sought to make state and national banks equal and competitive in their ability to participate in branching activities. This is accomplished through the medium of state branching law whose provisions are made applicable by federal law to the national banks. The McFadden Act so provides:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. §36(c). Of this section the Supreme Court has said that "Congress entrusted to the States the regulation of branching as Congress then conceived it." *First National Bank v. Dickinson, supra,* 396 U.S. at 133. It is clear then that a national bank may *operate* a facility such as the one at issue here only *if,* and to the extent, state law permits it for state banks. However, we reemphasize, that the primary determination of whether or not that facility *is* a branch is a matter of federal law. *Id.* at 134.



North Dakota has not permitted extensive branching by its banks:

> 6-03-13.1. *Separate drive-in facility authorized.*—Every bank organized under chapter 6-02, and under the supervision of the state banking board, and any national bank doing business in this state, may, upon compliance with sections 6-03-13.1 through 6-03-13.4, maintain and operate *separate and apart from its banking house one facility for drive-in and walk-up service, in addition to such service at its main banking house,* and at its paying and receiving stations, if any. Such facility shall be within the corporate city limits of the main banking house or within three miles of such city but shall not be within the corporate limits of another city. The services rendered at the separate facility shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank.
>
> Source: S. L. 1963, ch. 96, §1; 1973, ch. 66, §1.
>
> 6-03-13.2. *Further limitations upon facility.*—No bank may maintain or operate under sections 6-03-13.1 through 6-03-13.4:
>
> 1. More than one such facility separate and apart from its banking house, * * *.

N. D. Cent. Code §§6-03-13.1; 6-03-13.2 (emphasis added).

The district court concluded and the parties apparently agree that no authoritative interpretation of this statute, by the Supreme Court of North Dakota, exists. Nor are there administrative regulations which expand the statu-

tory provisions as in the *Nebraskans* case. The statute alone must be construed, and while deference is usually given to a district court's interpretation of state law, *Nebraskans for Independent Banking v. Omaha National Bank, supra,* 530 F.2d at 762, we are unable to do so here. The district court gave no reason whatsoever for its conclusion that in its view "a state bank in circumstances similar to that in which the First National has found itself would be permitted to operate similar facilities." Nor do we agree with the district court that, unlike the *Nebraskans* case, the Comptroller had before him no evidence that the State Banking Commissioner questioned the legality of operating both facilities. The State Banking Commissioner's letter to the Comptroller was clear;[6] the Comptroller duly noted in his files that "Commissioner Ellwein contested the legality of this application."

[6]The Commissioner's January 1975 letter stated:

> It would appear that the First National Bank & Trust Company, Fargo, North Dakota, if the Comptroller granted the branch as applied for at University Drive South between twenty-eighth and twenty-ninth avenues in Fargo, Cass County, North Dakota, would be in violation of Section 5155 (c) B. Branches of National Banks. Federal Reserve Act, Section 6-03-13.2, North Dakota Century Code, specifically limits that only one facility separate and apart from its banking house is authorized.

The trial court noted that the Commissioner had also submitted a brief contrary to the position of the Comptroller but that the "North Dakota State Banking Board is the administrative agency responsible for approving separate facilities for state banks. The Commissioner is not an administrative agency and he has no authority to act separately from the State Banking Board in an individual capacity."

In this court an amicus brief was filed on behalf of the North Dakota State Banking Board by its counsel, Special Assistant Attorney General, which takes the same position as the Commissioner. Although the trial court may have been technically correct in stating that "the Comptroller had no indication that the North Dakota State Banking Board, the sole authorizing agency, would not allow a state bank to operate facilities similar to those requested by First National," the letter certainly was sufficient to advise him of the statutes involved and to alert him to the legal issue presented thereby.



In any event, we find the words of the North Dakota statute plain and clear. A state bank is allowed one drive-in and walk-up facility *at the main bank;* it is allowed one other, "separate and apart" from the main bank. The statute quite clearly distinguishes the two allowable drive-in/walk-up facilities on the basis of their physical proximity to the main banking facility.

The state Commissioner's view, supported in this court by the State Banking Board, that First National would be impermissibly operating two separate and apart facilities, supports our similar conclusion. And "[w]hile the state director's view is not dispositive, it is certainly illuminating on the extent to which a state bank could extend its operation under * * * [state] law * * *." *Nebraskans for Independent Banking v. Omaha National Bank, supra,* 530 F.2d at 762.

Our conclusion fosters the policy of competitive equality which Congress desired and which it implemented by establishing a broad definition of "branch" and by making state branching privileges and limitations applicable to nationally-chartered banks. We do not agree with the district court that the policy of competitve equality should be implemented by the Comptroller's assessment in a particular case of the projected economic impact of the facility or its "relatively" close physical proximity to the main bank. We conclude that the 404 Main Avenue Auto Bank facility is a branch, and that the First National is impermissibly operating *two* "separate and apart" facilities for drive-in and walk-up services by its addition of the University Drive location.

*The Bank of North Dakota.*

We agree with the district court in its decision with respect to the unusual Bank of North Dakota. The Bank of North Dakota is the banking institution of the State of North Dakota.

> 6-09-01. *Purpose and establishment of Bank of North Dakota.*—For the purpose of encouraging and promoting agriculture, commerce, and industry, the state of North Dakota shall engage in the business of banking, and for that purpose shall maintain a system of banking owned, controlled, and operated by it, under the name of the Bank of North Dakota.

N. D. Cent. Code §6-09-01 (1975). The Bank may receive deposits from any source; all state funds must be deposited there and according to material submitted by the Comptroller in its brief, 75 percent of its deposits are those of the state of North Dakota; it is subject to a number of restrictions and afforded some privileges. *See* N. D. Cent. Code §§6-09-01 to 6-09-34. Appellees have argued that the statute printed above plus §6-09-02 ("[t]he industrial commission shall operate * * * the Bank of North Dakota, locate and maintain its *places of business* * * * " (emphasis added)) authorize this bank to engage in unlimited branch banking, and that as a matter of competitive equality, national banks should enjoy the same privilege.

The McFadden Act provides the following definition of a "state bank" for the purposes of the Act:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to



> include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. §36(h). The definition obviously does not address the specific problem of a *state-owned* bank as a bank operating "under the authority of State laws." However, the character of the Bank of North Dakota, as interpreted by the district court and with which we agree, is that of an agency of the sovereign power. It is in effect an arm of the state of North Dakota. It would be inimical to the policy of *competitive equality* to accord privately-owned, *nationally*-chartered banks the same privileges given to the sovereign when they are denied to privately-owned, state-chartered banks. We are persuaded that competitive equality was intended to be maintained between the privately-owned banking institutions, state and federal, rather than between the national banks and the *state itself* in its banking endeavors. As such, we do not include the Bank of North Dakota within the definition or meaning of §§36(h) or 36(c). We express no opinion as to whether the Bank of North Dakota has unlimited branching powers under state law.

*Conclusion.*

The Comptroller identified the First National Auto Bank as an "extension" as a result of his misunderstanding of the applicable law; the district court upheld the Comptroller's conclusion by applying an erroneous standard of review to the interpretation of statutes by the Comptroller. As we have concluded that the Auto Bank facility is a branch and, as such, subject to the state's re-

strictions on branch banking, we accordingly direct that the Comptroller of the Currency be enjoined from issuing a certificate for operation of the University Drive facility. Reversed and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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## APPENDIX D

DAKOTA NATIONAL BANK AND TRUST CO., a National Banking Association,

Plaintiff,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO, a National Banking Association and James Smith, Comptroller of the Currency,

Defendants.

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No. A3-75-40.

United States District Court,
D. North Dakota,
Southeastern Division.
June 18, 1976.

Action was brought seeking declaration that national bank's branch approved by the Comptroller of Currency was prohibited by statute and that the Comptroller be enjoined from issuing a branch certificate and bank be enjoined from establishing and operating the branch. The District Court, Benson, Chief Judge, held, inter alia, that on appeal from Comptroller's administrative action in redesignating branch as an extension of national bank's main office and thereafter allowing new branch in another location, standard of review was the "arbitrary and capricious" standard; that the designation of drive-in and walk-up facility a short distance from the main office as an extension of the main office rather than a branch was not arbitrary and capricious, in that state bank in similar cir-

cumstances would be permitted to operate similar facilities; and that subsequent approval of the new branch was also not arbitrary or capricious, an abuse of discretion, nor otherwise not in accordance with law.

Defendants' motion for summary judgment dismissing the action granted, and motion for protective order denied.

*1. Banks and Banking*

Competing national bank had standing to maintain action challenging redesignation of another national bank's branch as an extension of its main office, and subsequent approval of application to establish and operate another branch, despite contention that it could not have been injured since it had the same right to establish a drive-up installation as an extension of its main facility. U.S.C.A. Const. art. 3, §1 et seq.

*2. Banks and Banking*

On appeal from Comptroller of the Currency's redesignation of national bank's facility as an extension of its main office rather than a branch, and from subsequent approval of a branch to another location, review of both factual determinations and legal conclusions of the Comptroller, and, in particular, contention that facts found did not support Comptroller's decision and, as applied, resulted in a violation of state and federal law were to be reviewed under the "arbitrary and capricious" standard. 5 U.S.C.A. §551(7); National Bank Act, 12 U.S.C.A. §36(c).

*3. Banks and Banking*

On appeal from Comptroller of the Currency's redesignation of national bank's facility as an extension of its



main office rather than a branch and subsequent approval of a branch to another location, administrative record of earlier application for authority to operate the redesignated facility as a branch was a relevant record to be considered by the court, while affidavit and newspaper advertisement of defendant bank, constituting evidence not in the administrative record, were not.

*4. Federal Civil Procedure*

Summary judgment is appropriate only where moving party conclusively demonstrates that there is no genuine issue of material fact and that the movant is entitled to prevail as matter of law. Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A.

*5. Banks and Banking*

Consideration of competitive equality is of greater importance than other factors in determining whether a national bank's separate facility is a branch or merely an extension, and fact that a state bank would not be permitted to operate challenged facility in addition to other existing facilities must take precedence as a decision criterion over other factors. National Bank Act, 12 U.S.C.A. §36.

*6. Banks and Banking*

Determination of the Comptroller of the Currency that national bank's drive-in and walk-up facility located a short distance from the main office could be considered an extension of the main office rather than a branch was not arbitrary and capricious in light of facts, inter alia, that it did not introduce bank services into a new and different area of economic interest but provided service that had been discontinued immediately adjacent to the

main office upon the opening of a pedestrian mall, and in that under North Dakota statutes a state bank in similar circumstances would be permitted to operate similar facilities. NDCC 6-03-13.1, 6-03-13.2; National Bank Act, 12 U.S.C.A. §36.

*7. Banks and Banking*

"State banks" as used in statute limiting national banks' operation of branches to that which would be permitted to state banks did not include Bank of North Dakota, which was a state agency authorized by the State Constitution and generally restricted by statute from making loans to individuals, and thus concept of competitive equality did not authorize national bank to operate unlimited branches on ground that the Bank of North Dakota is so authorized. National Bank Act, 12 U.S.C.A. §36(c, h); NDCC 6-02-01 et seq., 6-03-13.2, 6-09-02, 6.09.15; Const. N.D. Amends.Art. 32.

See publication Words and Phrases for other judicial constructions and definitions.

*8. Banks and Banking*

In determining whether state bank would be authorized to maintain certain drive-in and walk-up facility as extension of its main office rather than as a branch, within state limitations imposed on branch banking, so that national bank could so maintain such facility, federal court was not bound by opinion of State Commissioner of Banking and Financial Institutions, who was not an administrative agency and had no authority to act separately from the State Banking Board.



*9. Banks and Banking*

Approval by the Comptroller of the Currency of application of national bank to operate a branch was not arbitrary or capricious, an abuse of discretion, nor otherwise not in accordance with law.

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John D. Kelly, Vogel, Vogel, Brantner & Kelly, Fargo, N.D. for plaintiff.

Charles A. Feste, Conmy, Feste & Bosart, Ltd., Fargo N.D., for First Nat. Bank; Rodger Nordbye, Faegre & Benson, Minneapolis, Minn., of counsel.

Harold O. Bullis, U.S. Atty. Fargo, N.D. for James Smith; Rex E. Lee, Asst. Atty. Gen., Harland F. Leathers, Susan P. Engleman, Dept. of Justice, Dorothy S. Kulig, Gary L. Ryan, Office of Comptroller of Currency, Washington, D.C., of counsel.

## MEMORANDUM OF DECISION AND ORDER

BENSON, Chief Judge.

## STATEMENT OF THE CASE

On May 9, 1975, the Comptroller of the Currency (Comptroller), after an adversary hearing, approved the application of Defendant First National Bank and Trust Company of Fargo, a National Banking Association (First National), to establish a branch on South University Drive in Fargo, about three miles away from its banking house. Plaintiff Dakota National Bank and Trust Company, a National Banking Associatoin (Dakota National), brought this action alleging:

"The approval of the First National application by the Comptroller of the Currency was arbitrary, capricious and unlawful. Specifically, in view of the provisions of §6-03-13.1 through §6-03-13.4 of the North Dakota Century Code [NDCC] approval of the proposed First National branch in south Fargo is contrary to 12 U.S.C. 36."

The relief requested by Dakota National is a declaration that in view of NDCC §6-03-13.1 through §6-03-13.4, the branch is prohibited by 12 U.S.C. §36, and that the Comptroller be enjoined from issuing a branch certificate and First National be enjoined from establishing and operating a banking facility at the proposed branch location.

Dakota National's jurisdictional allegation is worded:

"The amount in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs. Jurisdiction and venue are established under the provisions of Chapter 2, Title 12 of U.S.C. including 12 U.S.C. 36 and 94, and under 5 U.S.C. 701 et seq and 28 U.S.C. 1331, 1394, 2201, and 2201."

The matter is before the Court on motions for summary judgment filed by each of the three parties. The Comptroller included in his motion attached certified copies of the administrative record compiled on the application of First National to establish a branch on South University Drive; certified copies of his administrative record compiled on the application of First National to redesignate its branch at 404 Main Avenue (4th and Main), Fargo, as an extension of the bank's main office; and an affidavit



of Deputy Comptroller Richard J. Blanchard giving the Comptroller's reasoning in recharacterizing the facility at 4th and Main as an extension of the bank's main office.

Dakota National included with its motion for summary judgment an affidavit by its attorney identifying an attached exhibit as the administrative file of the Comptroller relating to the 1971 application of First National to establish and operate a branch at 4th and Main.[1] It also included an affidavit of A. M. Eriksmoen, President of Dakota National, identifying an attached First National newspaper advertisement relating to alleged banking services offered by First National at its three facilities. Defendants have moved to strike the affidavits and exhibits.

On application, leave was granted to Gilbert W. Ellwein, North Dakota Commissioner of Banking and Financial Institutions, to file an amicus curiae brief.

## STANDING

[1] Defendants have raised an initial issue of whether Plaintiff has standing to sue in this proceeding. They argue that since Dakota National has the same right to establish a drive-up installation as an extension of its main facility as does First National, that Dakota National cannot have been injured, thereby depriving this Court of jurisdiction since there is no Art. III case or controversy.

Plaintiff, which has operated a branch on South University Drive since 1962, has alleged it will "sustain irreparable injury, damage and loss of its banking business, particularly with regard to business conducted at its South University Drive branch facility . . ."

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[1]Upon redesignation in 1974 of the 4th and Main facility as an extension of the main bank, First National surrendered the branch certificate.

Defendants' argument goes to the merits and the question of standing is independent of the merits. In this case, it is clear the Plaintiff has standing. *See Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

## STANDARD OF REVIEW

Initially, it is necessary to first determine the appropriate standard of review. The thrust of Plaintiff's case is the allegation that the Comptroller's certificate authorizing the branch on South University Drive in effect allows First National to operate two branches which, under state law would not be allowed to a state bank and under 12 U.S.C. §36 and the doctrine of competitive equality would thereby be denied to national banks.

[2] On December 23, 1974, First National was notified the Comptroller had approved its requested redesignation of the 4th and Main facility as an extension of the bank's existing main banking operation. On December 26, 1974, First National made application for the South University branch. If Plaintiff's action is an appeal from the Comptroller's redesignation of the 4th and Main facility and the Comptroller's subsequent approval of a branch on South University Drive, the proper standard of review is set out in *Camp v. Pitts,* 411 U.S. 138, 141-142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973).

> "[T]he proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing



> findings made on a hearing record, 5 U.S.C. §706 (2)(E). Nor [is] the reviewing court free to hold a *de novo* hearing under §706(2)(F) and thereafter determine whether the agency action was 'unwarranted under the facts.' It is quite plain from our decision in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, [91 S.Ct. 814, 28 L.Ed.2d 136] (1971), that *de novo* review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative action.
>
> * * * * * *
>
> The appropriate standard for review [is], accordingly, whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law's as specified in 5 U.S.C. §706(2)(A). In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts, supra.*

Conversely, if this is not an appeal from the Comptroller's adjudication, this Court is not bound by the narrow "arbitrary and capricious" standard, but should take evidence and adjudicate the issue of whether First National is entitled to operate a branch on South University Drive. *Nebraskans for Ind. Banking v. Omaha Nat. Bank,* 530 F.2d 758, 761 n. 5 (8th Cir. 1976). In that case, the Circuit Court reviewed the decision of the District Court under the clearly erroneous rule since the District Court had

reached its decision based on evidence admitted at a trial on the merits.

Determination of the proper scope of review is not ended by construing Plaintiff's action to be an appeal. The agency's adjudication is usually a mixed question of law and facts. Some courts hold that the factual determinations of the agency are to be reviewed by the narrow arbitrary and capricious standard, but the legal conclusion reached by the agency (in this case, that the Auto Bank is not a branch) must be judged by the "rightness" test, that is, whether the Comptroller's legal conclusion that the Auto Bank was not a branch was legally correct. This is a broader scope of review involving a *de novo* determination of the legal issues.

*Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48 (9th Cir. 1974) is cited as authority by Plaintiff in support of its position that this Court should review the Comptroller's legal conclusion by a *de novo* determination based on the record and additional affidavits. This still involves an appeal from the agency ruling but allows a broader scope of review of the legal conclusion reached. In *Seattle Trust, supra* at 50, the Court states:

> "The arbitrary and capricious standard has been judicially fashioned to protect against the wrongful exercise of discretion by the Comptroller regarding factual controversies. In this case, however, the principal issue was whether the Comptroller has acted within the limitations imposed upon him by federal and state law, not whether he has acted reasonably or unreasonably. If the Comptroller was incorrect in his interpretation of the law, he should have been overruled in the District Court. *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343, reh. den., 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 680 (1966). This standard of review has been customarily applied to cases involving interpretation of 12 U.S.C.A. §36(C). See *First National Bank v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1966)."



In the case now before this Court, Plaintiff was a party in an adversary proceeding before the Comptroller relating to the South University Branch application, and over First National's objection, was permitted to offer evidence and argument on the question of whether the 4th and Main facility was a branch. The decision of the Comptroller was adverse to the Plaintiff, and it initiated this action naming the Comptroller as a party defendant, seeking, in part, declaratory and injunctive relief against the Comptroller. In addition, Plaintiff, citing *Seattle Trust* as authority contends the scope of review is a *de novo* review of the Comptroller's legal determination. In any event, Plaintiff has taken an appeal from the decision of the Comptroller and the question for the Court is whether to follow *Seattle Trust* and delineate between the questions of fact and law determined by the Comptroller or to review the Comptroller's adjudication only under the arbitrary and capricious standard.

In *Camp v. Pitts, supra,* the Supreme Court said the "de novo review is appropriate only where there are adequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce

certain administrative actions." *Id.* 411 U.S. at 141, 93 S. Ct. at 1244. Plaintiff does not contend either that the fact-finding procedures utilized by the Comptroller were inadequate or that this action is a proceeding brought to enforce certain administrative action.

In *Camp v. Pitts, supra* at 142, 93 S.Ct. at 1244, the Court stated that the "appropriate standard for review [is] . . . whether the Comptroller's *adjudication* was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' . . .." (Emphasis added). An adjudication is defined as "agency process for the formulation of an order." 5 U.S.C. §551(7); *Bricklayers. Masons & Plasterers Int. U. of Am. v. N.L.R.B.*, 155 U.S. App. D.C. 47, 475 F.2d 1316, 1318 (19[illegible]). "[A]djudication is judicial rather than legislative in nature . . . has an accusatory flavor and may result in some form of disciplinary action . . ., and is concerned with issues of fact under stated law . . .." *American Express Company v. United States,* 472 F.2d 1050, 1055, 60 C.C.P.A. 86 (1973). "[A]djudication resembles what courts do in deciding cases . . . ." 1 Davis, Administrative Law Treatise 287 (1958). Applying these principles, this Court concludes that the United States Supreme Court in *Camp v. Pitts, supra,* intended that on an appeal from the Comptroller's administrative action, the review of both factual determinations and legal conclusions are to be under the "arbitrary and capricious" standard. This is consistent with the authority vested in the Comptroller under 12 U.S.C. §36(c) and the expertise to be expected from the Comptroller. Since this case involves a "specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *N.L.R.B. v. Hearst Publications,* 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944).[2]



Plaintiff does not allege the Comptroller misinterpreted the law, either federal or state. Nor does Plaintiff allege the Comptroller's determination of the facts was in error. In essence, it is Plaintiff's position that the facts do not support the Comptroller's decision and as applied resulted in a violation of state and federal law. Under these circumstances, this Court is limited to the *Camp v. Pitts* " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law' " standard. Consequently, the focal point for examination must be the administrative record as it existed at the time of the Comptroller's decision.

## THE RECORD

[3] Defendants' motion to strike the administrative record of the 1971 application of First National for authority to operate a branch at 4th and Main (later designated an extension of the main bank), which administrative record was made part of Plaintiff's motion for summary judgment, is based on Defendants' contention that the administrative record relating to the proceedings on the application for redesignation of the facility at 4th and Main and the application for a branch on South University Drive, together with the affidavit of Richard Blanchard, are the only relevant records to be considered by the Court.

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[2]The initial determination of "whether a proposed enlargement of a national bank is a 'branch' is a question of federal law to be determined initially by the Comptroller and reviewed by the federal courts." *Driscoll v. Northwestern National Bank of St. Paul,* 484 F.2d 173, 175 (8th Cir. 1973).

Defendants argue it would extend the review beyond the *Camp v. Pitts* standard if the Court were to consider the earlier record. The Court rejects this argument and finds that Plaintiff's Exhibit is a copy of the Comptroller's administrative record on the 1971 application of First National to establish the 4th and Main facility as a branch, and being a relevant record of the Comptroller's earlier action, under the *Camp v. Pitts* standard, is within the scope of review by this Court. The motion to strike the earlier record is denied. The Eriksmoen affidavit with the 1975 newspaper advertisement is clearly evidence not in the administrative record, and the motion to strike that evidence is granted.

The record that must be the focal point of this Court's review is comprised, then, of Plaintiff's Exhibit 1, consisting of the Comptroller's administrative file of the 1971 application by First National to establish a branch facility at 4th and Main, Defendants' Exhibit A, consisting of the Comptroller's certified copy of the file pertaining to the 1974 application of First National to establish a branch bank on South University Drive, Defendants' Exhibit B, consisting of the 1974 application of First National to redesignate the branch facility at 4th and Main as an extension of the bank's main office, and the Blanchard affidavit.

The record was compiled in the following manner: On September 22, 1971, First National applied to the Comptroller of the Currency for permission to establish a branch facility to be located at the intersection of Main Avenue and Fourth Street, Fargo, North Dakota. The summary of information apparently submitted by First National to the Comptroller indicated the proposed branch would



be located two blocks east and two blocks south of the main office, at a distance of 1,075 feet. The service proposed to be offered was:

> "deposits and withdrawals from checking and savings accounts, the sale of savings certificates, travelers checks, bank drafts, cashier's checks and bank money orders. Customers [would] be able to make loan payments . . . and applications [would] be accepted for commercial and real estate loans and after approval by staff members, the loans will be handled at the facility.
>
> * * * * * *
>
> The Head Office faces imminent prohibition of left turns for traffic off Broadway into the present drive-in facility which is an integral part of the Head Office building and the possible curtailment of all vehicular traffic on Broadway which is the principal street of downtown Fargo on which the Head Office is located. The bank desires to establish the proposed branch to alleviate the crowded and congested conditions at its drive-in facility and thus offer its customers more efficient and quicker service. The proposed facility will also help the bank to remain competitive." Plaintiff's Exhibit 1.

No protests were filed to this application after due notice was given and permission was granted to establish a *branch* at 4th and Main on October 27, 1971.

At the time the application was made and approval given, North Dakota law allowed a national bank doing business in this state to

"maintain and operate separate and apart from its banking house one facility for drive-in and walk-up service, whereat the services rendered shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank." NDCC §6-03-13.1 (1963).

"No bank may maintain or operate under sections 6-03-13.1 through 6-03-13.4:

(1) . . .

(2) Such a facility located more than *fifteen hundred feet* from its banking house. . . ." NDCC §6-03 13.2 (1963) (Emphasis added).

The North Dakota Legislature amended these statutes in 1973 to provide:

"Every bank organized under Chapter 6-02, and under the supervision of the state banking board, and any national bank doing business in this state, may, upon compliance with sections 6-03-13.1 through 6-03-13.4, maintain and operate separate and apart from its banking house one facility for drive-in and walk-up service, in addition to such service at its main banking house, and at its paying and receiving stations, if any. Such facility shall be within the corporate city limits of the main banking house *or within three miles* of such city but shall not be within the corporate limits of another city. The services rendered at the separate facility shall be limited to receiving the deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank." NDCC §6-03-13.1 (1975) (Emphasis added).



"No bank may maintain or operate under sections 6-03-13.1 through 6-03-13.4:

1. More than one such facility separate and apart from its banking house . . .

2. Such facility separate and apart from its banking house without first having obtained the approval of the state banking board or the comptroller of the currency, as the case may be." NDCC 6-03-13.2 (1975).

The McFadden Act, 12 U.S.C. §36 (1970), incorporates state law setting forth limits upon a national bank's maintenance and use of branch facilities.[3]

On July 25, 1974, First National made an *ex parte* application to the Comptroller of the Currency for permission to withdraw the authority to operate the facility at 4th and Main as a branch and to have it redesignated

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[3] 12 U.S.C. § 36, in pertinent part, provides:
"§ *36 Branch banks.*

The conditions upon which a national banking association may retain or re-establish and operate a branch or branches are the following:

* * * * *

c. A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the Statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

an extension of the main banking house. This was based principally on the "liberalization" by the State Legislature of the distance from the main facility a branch office could be located and because:

"1. Both are located within the core of downtown Fargo. The Drive-in facility is separated from the main banking house by a distance of only 550 feet.

2. The only structure located between the main banking house and the drive-in facility is a seed warehouse located on railroad right-of-way.

3. The only property located between the main banking house and the drive-in facility consists of railroad right-of-way and a dedicated street. There is no private property.

4. At the time the drive-in facility was constructed, both economics and customer convenience dictated that it not be located adjacent or any closer to the main banking house.

5. The site selected was the only practical available site on which to locate the drive-in facility." Defendants' Exhibit B at 031-032.[4]

[4]Other factors submitted by First National in support of its application to redesignate the 4th and Main facility as an extension of the main office and hence were factors in evidence in the administrative files were:

"1. *Mail.* All mail from the bank is addressed to and received at the main banking house. Any mail that is applicable to the drive-in facility is handled by the appropriate department head pertaining to that phase of the banking operation. Only one address, that of the main banking house, is used as a return address on all outgoing mail from the bank. No correspondence to any customer is originated by drive-in personnel at the drive-in facility.



Without notice to competing financial institutions and without conducting a hearing, the Comptroller of the Currency gave its approval to First National on December 23,

2. *Telephone.* The switchboard at the main banking house receives all incoming calls and distributes these calls to the appropriate departments including the drive-in facility.

3. *Logo.* All signage, stationary, forms, calling cards and other symbols are identical with no distinction between the main bank and the drive-in facility.

4. *Management.* No management level operating staff is present at the drive-in facility, nor are management level decisions made by the tellers located there. Policies concerning personnel are established by the personnel department located at the main bank. No individual at the drive-in facility answers questions pertaining to loans or investments.

5. *Status of Tellers.* Tellers at the drive-in facility report to the operations officer located in the main bank. All tellers at the drive-in facility have had training experience at the main bank under the supervision of a head teller. Tellers are rotated and substituted freely between the main bank and the drive-in. The duties of the tellers are the same at either location.

6. *Control.* No single officer has over-all responsibility for the drive-in facility. The maintenance officer handles both locations as does the single operations officer and the personnel officer. All three are headquartered in the main banking house. On Saturday when the main bank is closed, junior officers are assigned on a rotation basis to be present and field questions concerning operations from the tellers at the drive-in.

7. *Cash.* The drive-in facility handles approximately 60 per cent of the bank's cash transactions. As excess cash builds, it is transferred daily or more frequently to the main bank vaults by a local armored car service. Coin is delivered daily to the drive-in facility by bank messengers from the main bank as required to meet customer's needs.

8. *Parking spaces.* A nominal number of parking spaces is available at the drive-in facility. They are used primarily by more elderly customers of the bank who like the convenience of transacting business at the drive-in location, but who are apparently apprehensive about using automated equipment or conversing through electronic speakers.

9. *Records.* No separate accounting records are maintained of the activity of the drive-in facility. All operating input and output records are transported back and forth daily by means of bank messenger. The daily cash balancing is a part of the main bank operating procedure and drive-in differences are located, if

1974, for it to continue to operate its Auto Bank at 4th and Main as an extension of its main office. The branch certificate under which it had previously been operating was returned to the Comptroller and cancelled.

The Blanchard Affidavit before this Court states the reasons for the Comptroller's decision as follows:

> "On July 25, 1974, the First National Bank and Trust Company (hereinafter 'First National'), a national banking association whose main office is located in Fargo, North Dakota, requested that the Office of the Comptroller of the Currency reexamine First National's drive-up installation located at 404 Main Avenue, Fargo, North Dakota, then operating as a branch, for the purpose of recharacterizing the

possible, by a staff from the main bank. All signature cards are maintained in the main bank.

10. *Night Depository.* Night and letter-drop deposit facilities at the main bank and drive-in facility are keyed to open with the same pass keys. The service is interchangeable and customers may deposit their night depository bags at either facility and are able to pick up the bags at either facility. All records for the night depository are maintained at the main office.

11. *Loans.* No loans are transacted at the drive-in facility. Customers who are in need of the loan function of the bank are referred to the main bank. Any payments not of the regular monthly coupon variety normally handled by teller are referred to the appropriate department in the main banking house.

12. *Limited Service.* The drive-in facility handles only paying and receiving transactions. It does not provide safety deposit boxes, notary service, collections, loans or the sale of securities. It is not intended to be a 'full service' location.

13. *Meals.* Employees at the drive-in facility walk daily to the main office to use the cafeteria located there for their noon meal.

14. *Combined Use.* Recently a portion of the building housing the drive-in has been in use an an office for the marketing department of the bank. The head of that department handles the marketing for the entire bank, as well as serving as a regional marketing representative for the parent organization."

Defendant's Exhibit B at 010-012.



> installation as an extension of First National's main office premises.
>
> On August 8 and August 15, First National communicated further information to the Office of the Comptroller of the Currency regarding this proposed recharacterization.
>
> From the information supplied on the above three dates, the Comptroller's Office concluded:
>
> (a) First National was unable to continue to provide drive-up service for its customers at its main office in 1971 because of urban renewal plans to turn the sole access street into a pedestrian walk-way;
>
> (b) Discontinuation of drive-up service would subject First National's customers to the inconvenience of 'horse and buggy day banking' after they had become accustomed to the convenience and efficiency of the drive-up service now routinely provided by banks throughout the nation;
>
> (c) Physical modifications to the existing main office premises to provide drive-up service were unfeasible;
>
> (d) No other property contiguous to First National's main office premises was available for expansion;
>
> (e) The only reasonably available premises upon which First National could continue to provide drive-up service to its customers was a tract of land located approximately 550 feet (168 meters)

from the existing main office premises, and, out of necessity, this was purchased for the purpose of relocating the unusable drive-up installation;

(f) The only intervening structure at ground level was a building scheduled to be razed pursuant to urban redevelopment plans;

(g) The only intervening property was a railroad easement and a dedicated street;

(h) The drive-up installation would continue to provide limited service to First National's existing customers in the main office service area;

(i) All transactions entered into at the drive-up installation would be processed at the main office;

(j) The drive-up installation would be completely dependent upon the main office and could function only in conjunction with the main office to enable First National to continue to provide modern, convenient service to its existing customers; and

(k) The operation of the drive-up installation had resulted in no injury to any of First National's competitors and had not affected the competitive balance in the market.

In determining whether an additional installation, adjunctive to an existing main office, amounts to the establishment of a branch or merely an extension of the existing main office premises, the Comptroller of the Currency examines all of the facts and circumstances surrounding the additional installation.



The factors weighed by the Comptroller of the Currency include, but are not limited to, the distance separating the additional and existing installations, the presence or absence of any intervening structures, the presence or absence of any physical connection, the economic effect of the additional installation upon the balance of competition within the banking community, and the feasibility of placing the additional installation closer to the existing office. No single factor is controlling."

On December 26, 1974, First National made application to the Comptroller for a certificate to operate a proposed facility on South University Drive between the avenues of 28th and 29th as a branch. Notice of the application was published in a local newspaper, and notice was given to local competing financial institutions and to the North Dakota Department of Banking and Financial Institutions. Pursuant to this notice, Plaintiff advised the Comptroller in writing on February 6, 1975, that it was opposed to the application and that it requested a hearing. An adversary hearing was held February 28, 1975, at which both parties to the instant action were present and represented by counsel. After an investigation by the examiner from the Comptroller's office, approval of the application to operate a branch facility followed.[5]

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[5]The Comptroller did not make formal findings on the hearing record, but "[i]t is undisputed that neither the National Bank Act nor the Administrative Procedure Act requires the Comptroller to make formal findings of a hearing record." *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1378-1379 (8th Cir. 1964), *cert denied*, 421 U.S. 930, 95 S.Ct. 1655, 44 L.Ed.2d 86 (1975).

## CONCLUSION

The Court concludes Plaintiff has failed to meet its burden of showing by a preponderance of the evidence that the Comptroller's ruling is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

## RATIONALE

[4] Summary judgment is appropriate only where the moving party conclusively demonstrates that there is no genuine issue of material fact and that the movant is entitled to prevail as a matter of law. F.R. Civ. P. 56. *Kroger v. Omaha Public Power District,* 523 F.2d 161, 162 (8th Cir. 1975). There are cross motions for summary judgment in this case and no genuine issues of material fact.

The "arbitrary and capricious" standard of review to which the Court is limited has been commented on by the Court of Appeals, Eighth Circuit.

> "The 'arbitrary and capricious' standard of review is a narrow one. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814 [28 L.Ed.2d 136] (1975). Its scope is more restrictive than the 'substantial evidence' test which is applied when reviewing formal findings made on a hearing record. *See Camp v. Pitts, supra,* 411 U.S. at 141, 93 S.Ct. 1241 [36 L.Ed.2d 106]; *Webster Groves Trust Co. v. Saxton, supra,* 370 F.2d at 387; *Charlton v. United States,* 412 F.2d 390, 398 (3d Cir. 1969) (Stahl, Circuit Judge, concurring). 'Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational



> basis.' *Carlisle Paper Box Co. v. N.L.R.B.,* 398 F.2d 1, 6 (3d Cir. 1968). Something more than mere error is necessary to meet the test. *N.L.R.B. v. Parkhurst Manufacturing Co.,* 317 F.2d 513, 518 (8th Cir. 1963). To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was 'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case * *.' 73 C.J.S. Public Administrative Bodies and Procedure §209 at 569 (1951)." *First National Bank of Fayetteville v. Smith,* 508 F.2d 1371, 1376 (8th Cir. 1974).

A heavy burden has been placed on those who contend a Comptroller's decision to be arbitrary or capricious. The Court must determine whether Plaintiff has met this burden in light of *Nebraskans for Ind. Banking v. Omaha Nat. Bank, supra. (Nebraskans).*

In *Nebraskans,* the Eighth Circuit, sitting en banc, held that where the detached drive-in and walk-up office facility offered most customary banking services; accepted deposits; cashed checks; made noncommercial loans; was a custom-built, free-standing building located approximately one block from the main bank's entrance; unattached to the main bank; separately staffed; with a separate telephone listing; and maintained somewhat longer public hours than did the main bank, the detached facility was a branch of the main bank and not merely an extension of its operation, notwithstanding the fact that there was a pneumatic tube connecting the two buildings, and the fact that the detached facility did not offer safe deposit boxes, trust services, international banking or commercial loans. *Nebraskans* did not involve an appeal from the Comp-

troller's ruling, which relieved the Court from the narrow "arbitrary and capricious" standard of review.[6]

The McFadden Act defines the term "branch" as follows:

> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. §36(f).

The United States Supreme Court has held that

> "the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. . . . [T]he offering of any one of the three services mentioned in that definition will provide the basis for finding that 'branch' banking is taking place." *First National Bank v. Dickinson*, 396 U.S. 122, 135, 90 S.Ct. 337, 344, 24 L.Ed.2d 312 (1969).

In *Nebraskans*, the Eighth Circuit noted:

> "It is established that what constitutes a 'branch' is a question of federal law, not controlled by state law definitions, *First National Bank v. Dickinson*, 396 U.S. 122, 133, 90 S.Ct. 337, 24 L.Ed.2d 312

[6]"As this is not an appeal from the Comptroller's ruling, we are not bound by the narrow 'arbitrary and capricious' standard of review. *Cf. Sterling National Bank v. Camp*, 431 F.2d 514, 516 (5th Cir. 1970), cert. denied, 401 U.S. 925, 91 S.Ct. 879, 27 L.Ed.2d 829 (1971); *Dunn v. First National Bank*, 345 F.Supp. 853, 857 (N.D. Ga. 1972). *See also Mid-West Nat'l Bank v. Comptroller*, 296 F. Supp. 1223, 1226 (N.D. Ill. 1968)." *Nebraskans, supra* at 761, n. 5.



(1969); *Driscoll v. Northwestern National Bank*, 494 F.2d 173, 175 (8th Cir. 1973), but the determination must be made on the facts of each case, not according to a fixed test. *North Davis Bank v. First National Bank*, 457 F.2d 820 (10th Cir. 1972). *Nebraskans, supra* at 759.

and

> "[T]he Supreme Court's use of the phrase 'apart from the chartered premises' was not intended to classify every free-standing facility as a branch. *Virginia ex rel. State Corporation Commission v. Farmers & Merchants Bank*, 380 F.Supp. 568, 572 (W.D. Va. 1974), *aff'd per curiam*, 515 F.2d 154 (4th Cir.), *cert. denied*, 423 U.S. 869, 96 S.Ct. 133, 46 L.Ed. 2d 99, 44 U.S.L.W. 3205 (1975). However, lack of physical connection to the main bank is obviously a necessary though not sufficient characteristic shared by all facilities 'apart' from the chartered premises.' " *Nebraskans, supra* at 760.

*Nebraskans* involved the law of Nebraska which permitted state chartered banks to maintain one "attached" and two "detached auxiliary teller offices", Neb.Rev.Stat. §8-157 (Supp.1974) It also involved application of Nebraskan banking regulation providing that a pneumatic tube connecting the two detached facilities did not convert the detached facility into an attached facility.

The North Dakota statute authorizes drive-in and walk-up service at the main banking house and a similar service at a facility separate and apart from its main banking house within the corporate city limits of the main banking

house or within three miles of such city but not within the corporate limits of another city.

It is undisputed that deposits are received and checks paid at the 4th and Main facility. Nor is it disputed that the facility is free standing and located some two blocks distant. *Nebraskans* held that "a free-standing facility located around the corner one block up and across the street from the main bank's south entrance . . . even if connected by a pneumatic tube, is one located 'apart from the chartered premises' as a matter of law." *Nebraskans, supra* at 763. In the instant case, the only physical connection between the Auto Bank and the main office is a direct telephone line.

[5] However, other factors as an aid to the factfinder and that were considered by the Comptroller in this case in analyzing the circumstances of a particular case have been approved.

> "The cases considering the factual question whether a given national bank facility is a 'branch' have identified the number of factors to be assessed in making the determination. They include (1) the distance separating the main bank from the added facility; (2) the presence or absence of intervening structures; (3) the physical connection, if any, between the main bank and the facility; (4) the effect upon the balance of competition (that is, whether the facility expands in a material way customer access to banking services in a location not previously served so as to give a material competitive advantage in securing customers); (5) the availability of other locations for attached expansion; and finally (6) the dependence of the facility upon the main bank in day-to-day banking operations." *Nebraskans, supra* at 760-761 (Footnote omitted).



It is settled that the "threshold question of whether a proposed enlargement of a national bank is a 'branch' is a question of federal law to be determined initially by the Comptroller and reviewed by the federal courts. However, the overriding policy of the [McFadden] Act is one of 'competitive equality' between state and national banks." *Driscoll v. Northwestern National Bank of St. Paul,* 484 F.2d 173, 175 (8th Cir. 1973). Thus, consideration of competitive equality is of greater importance than the other factors in determining whether a separate facility is a branch or merely an extension. In addition, "[b]y force of the language of §36 itself, the fact that a state bank would not be permitted to operate the challenged facility in addition to its other existing facilities, *must take precedence as a decision criterion over the many administratively and judicially conceived factors discussed above.*" *Nebraskans, supra* at 762. (Emphasis added).

In the instant case, the Court has noted the evidence before the Comptroller.

[6, 7] The 4th and Main facility is located a relatively short distance from the main office.[7] It is not located so as to introduce the bank services into a new and different area of economic interest. The facility was to provide a drive-in, walk-up service that had been discontinued immediately adjacent to the main bank office upon the opening of Broadway Mall.[8] Based on these factors that were

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[7] If measured in a straight line, the distance is approximately 550 feet. Plaintiff would measure the distance as approximately 1250 feet by following the usual route of travel between the two points.

[8] A drive-in, walk-up facility is maintained by each of the other three national banks in Fargo in connection with the main banking house of each. Each also maintains a separate such facility apart and more distant from its main banking house. The drive-in, walk-up facility maintained by each in connection with its main banking house varies in the type of structure and distance from the main banking house.

a part of the file of the Comptroller it cannot be said there was no evidence to support the Comptroller's determination that the 4th and Main facility did not alter the important element of competitive equality between state and national banks.[9]

The Commissioner of Banking and Financial Institutions of North Dakota has submitted a brief in opposition to the Comptroller's position. The Commissioner also notified the Comptroller prior to its final determination on the application that "[i]t would appear that [First National], if the Comptroller granted the branch as applied for at University Drive South between twenty-eighth and

[9]Defendants assert that they are entitled to remain in competitive equality with the Bank of North Dakota. NDCC § 6-09-02 (1975) provides in part:

> "The industrial commission shall operate, manage and control the Bank of North Dakota, locate and maintain its places of business, of which the principal place shall be within the state, and make and enforce orders, rules, regulations and bylaws for the transaction of its business. The business of the Bank . . . may include anything that any bank lawfully may do. . . ."

Defendants assert that because the Bank of North Dakota is authorized by statute to operate as many branches as it wishes (in spite of the fact that it has operated only one facility during its existence) that national banks may do the same. The Court does not accept this contention. The Bank of North Dakota was authorized by a constitutional amendment that provides, in part, that the state may make internal improvements and may engage in any industry, enterprise or business excepting the manufacture, sale and disposition of intoxicating liquors. Article 32 Amend. N.Dak. Constitution. Its status is that of an agency of the sovereign power. *Sargent County v. State*, 47 N.D. 561, 182 N.W. 270 (1921). As such it enjoys certain privileges and immunities not similarly shared by banks organized under NDCC Chapter 6-02. *See Paulus v. State of South Dakota*, 58 N.D. 643, 227 N.W. 52, 54 (1929). On the other hand, the Bank of North Dakota is restricted by statute upon real estate and warehouse receipts, *State v. Dakota Nat. Bank of Dickinson*, 52 N.D. 98, 201 N.W. 851 (1924), and from making real estate loans to nonresident farmers, *Hendrickson v. Syverson*, 82 N.W.2d 827 (N.D. 1957). NDCC § 6-09-15 (1975). Based on these factors the Court holds that the term "State banks" as used in 12 U.S.C. § 36(c) and as defined in 12 U.S.C. § 36(h) does not include the Bank of North Dakota but rather that the concept of competitive equality was meant to preserve competition between national banks and state banks in North Dakota organized under NDCC Chapter 6-02 only.



twenty-ninth avenues in Fargo, Cass County, North Dakota, would be in violation of Section 5155(c) B. Branches of National Banks. Federal Reserve Act, Section 6-03-13.2, North Dakota Century Code, specifically limits that only one facility separate and apart from its banking house is authorized." To this the Comptroller responded,

> "On December 23, 1974, the Comptroller of the Currency ruled that the Bank's established 'Auto Bank Branch' at 404 Main Avenue, Fargo, North Dakota, constituted an extension of banking premises rather than a branch. Therefore, it appears that the present application is legal under North Dakota law." Defendant's Exhibit A at 133.

[8] The North Dakota State Banking Board is the administrative agency responsible for approving separate facilities for state banks. The Commissioner is not an administrative agency and he has no authority to act separately from the State Banking Board in an individual capacity. *First American State Bank & Trust Company v. Ellwein*, 198 N.W.2d 84 (N.D. 1972). The letter from the Commissioner does not show that the Comptroller was aware of a determination by the State Banking Board that in the latter's opinion the proposed South University branch would constitute the operation of two branches. Rather, it appears that the Comptroller believed the North Dakota Commissioner was merely unaware of the Comptroller's prior ruling that the Auto Bank was not a branch, thereby allowing First National to establish the South University Drive facility. Since the Commissioner made no further response to the Comptroller concerning his opinion as to the legality of the proposed branch, the administrative record did not contain evidence that in the opinion

of the State Banking Board, the proposed facility was illegal under state law. Thus, contrary to *Nebraskans*, the Comptroller had no indication that the North Dakota State Banking Board, the sole authorizing agency, would not allow a state bank to operate facilities similar to those requested by First National. It is the view of this Court that under the North Dakota statutes a state bank in circumstances similar to that in which the First National has found itself would be permitted to operate similar facilities.[10]

The narrow standard of review available to this Court under *Camp v. Pitts, supra,* does not permit the Court to substitute its judgment for that of the Comptroller as to whether First National should be permitted to open a branch on South University Drive in addition to its main bank and its facility on 4th and Main. It is the Comptroller of the Currency who is charged with administering the McFadden Act, and his adjudication should not be upset in an absence of a showing by a preponderance of the evidence that the decision under the facts of this case was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Comptroller's decision is a rational common sense decision rendered on the facts unique to the case.

One point remains to be considered. At the Comptroller's adversary hearing, Plaintiff raised three issues as follows:

[10]There are no court decisions or authority, other than the opinion of the North Dakota Commissioner of Banking and Financial Institutions expressed in his amicus curiae brief filed with this Court, holding that a state bank would not be permitted, under similar circumstances, to operate the same type facilities that have been permitted to First National. For the Comptroller and the federal courts to be bound by the opinion of the Commissioner would be an extreme illustration of a situation described by Judge Lay in his concurring opinion in *Nebraskans* as the "tail wagging the dog".



1. Is establishment of the proposed First National branch permissible under applicable North Dakota law?

2. Is there a need for the proposed First National branch and will approval of the branch application prove injurious to existing banking facilities providing primary service to South Fargo?

3. Is establishment of the proposed First National Branch reasonably necessary to maintain or improve First National's competitive position among banking institutions in the Fargo area?

[9] The arguments of the parties in the case before this Court were directed solely towards the issue of whether the branch was permissible under applicable North Dakota law. While Plaintiff may be deemed to have abandoned the remaining two issues, the Court has examined the record and holds the Comptroller's adjudication adverse to the position of the Plaintiff on the two issues is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

IT IS ORDERED that the Motion for Summary Judgment by Defendants First National Bank and Trust Company of Fargo, and James Smith, Comptroller of the Currency, are GRANTED.

IT IS FURTHER ORDERED that summary judgment dismissing Plaintiff's action be entered, and

IT IS FURTHER ORDERED that Defendant's pending motion for a protective order is DENIED.

## APPENDIX E

Section 706 of the Administrative Procedure Act, U.S.C. §706 (1970) provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, priviledge, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.



> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of prejudicial error.

Section 36 of the McFadden Act, 12 U.S.C. §36 (1970) provides:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> (a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.
>
> (b) (1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—
>
> (A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;
>
> (B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of a national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or



(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on

State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the operating of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.



(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601-605 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

North Dakota Century Code §6-03-13.1 (1975) provides:

*Separate drive-in facility authorized.* Every bank organized under chapter 6-02, and under the super-

vision of the state banking board, and any national bank doing business in this state, may upon compliance with sections 6-03-13.1 through 6-03-13.4, maintain and operate separate and apart from its banking house one facility for drive-in and walk-up service, in addition to such service at its main banking house, and at its paying and receiving stations, if any. Such facility shall be within the corporate city limits of the main banking house or within three miles of such city but shall not be within the corporate limits of another city. The services rendered at the separate facility shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank.

North Dakota Century Code §6-03-13.2 (1975) provides:

*Further limitations upon facility.* No bank may maintain or operate under sections 6.03-13.1 through 6-03-13.4:

1. More than one such facility separate and apart from its banking house, except facilities required by the United States government to be maintained by it as a financial agent of the government on government reservations solely for military and other government personnel, provided, however, that nothing in this section shall be construed to authorize any bank to establish or maintain such facilities as financial agent of the government on government reservations; or
2. Such facility separate and apart from its banking house without first having obtained the approval



of the state banking board or the comptroller of the currency, as the case may be.

North Dakota Century Code §6-03-13.3 (1975) provides:

*Facts considered for approval.* Whenever any bank desires to maintain and operate a facility separate and apart from its banking house, pursuant to sections 6-03-13.1 through 6-03-13.4, or to move a facility previously established to another location, it shall apply to the state banking board or the comptroller of the currency, as the case may be, for such authority and provide the board with such relevant information as the board may reasonably request. In determining whether or not to approve the application for such facility, the banking board shall take into consideration the following facts:

1. The convenience, needs and welfare of the people of the community and area served;
2. The financial strength of the bank in relation to the cost of establishing and maintaining such separate facility; and
3. Whether other banks will be seriously injured by the approval of the application.

North Dakota Century Code §6-03-13.4 (1975) provides:

*Effect of authority.* Nothing in sections 6-03-13.1 through 6-03-13.4 shall be deemed to authorize the maintenance or operation of a branch bank, but a facility authorized hereunder may be supplementary

or in addition to paying and receiving stations permitted under section 6-03-14. National banking associations located in this state shall have the same, but no greater right by virtue of sections 6-03-13.1 through 6-03-13.4 as banks organized under the laws of this state.

North Dakota Century Code .6-09-01 (1975) provides:

*Purpose and establishment of Bank of North Dakota.* For the purpose of encouraging and promoting agriculture, commerce, and industry, the state of North Dakota shall engage in the business of banking, and for that purpose shall maintain a system of banking owned, controlled, and operated by it, under the name of the Bank of North Dakota.

North Dakota Century Code §6-09-02 (1975) provides:

*Industrial commission to operate Bank—Business of Bank.* The industrial commission shall operate, manage, and control the Bank of North Dakota, locate and maintain its places of business, of which the principal place shall be within the state, and make and enforce orders, rules, regulations, and bylaws for the transaction of its business. The business of the Bank, in addition to other matters specified in this chapter, may include anything that any bank lawfully may do, except as it is restricted by the provisions of this chapter. This provision shall not be held in any way to limit or qualify either the powers of the industrial commission granted by nor the functions of said Bank as defined in this chapter.

---



**APPENDIX F**

FIRST NATIONAL BANK
15 Broadway
Fargo, North Dakota 58102
701-293-1333

July 25, 1974

Mr. James Smith
Comptroller of the Currency
U.S. Treasury Department
Washington, D.C. 20013

Dear Mr. Smith:

Re: The First National Bank and Trust Company of Fargo, Charter No. 2377

This letter is to present to you and Mr. Blanchard a brief outline of a proposal concerning the existing drive-in facilities of First National Bank in Fargo operated as a branch under Certificate No. 16420A which we would like to discuss further with you when we meet with you on Thursday, August 8, 1974.

North Dakota law provides that a state bank organized under Chapter Six of the North Dakota Century Code entitled "Banks and Banking" may maintain one drive-in facility separate from its main banking house. Prior to July 1, 1973, the maximum distance from the main banking house within which a separate facility could be located was 1500 feet. The 43rd Legislative Assembly, however, amended the statute to permit the separate drive-in facility to be located within three miles of the city limits of the municipality where the main banking house is located.

This action has, of course, had considerable impact because it now permits a bank to have a separate facility (branch) in a suburban area of growth surrounding the city where the main banking house is located.

In 1971 the management of The First National Bank and Trust Company of Fargo was faced with the unwelcome prospect that within a short time its then drive-in facility, which was a part of the main banking house, would no longer be usable. This situation was created because the City of Fargo proposed to construct a pedestrian mall on Broadway, the street on which the bank fronts, thus closing it to vehicle traffic. The only entrance to the drive-in facility was by way of Broadway. Already at that time the Traffic Bureau of the Police Department had determined to ban all left turns from Broadway, which included left turns into the drive-in because the only other street in proximity to the bank was a one-way thoroughfare.

Against this background the bank was faced with the necessity of finding a location for its drive-in facility that would be both economically feasible and still provide its customers with as much convenience as possible considering the downtown traffic situation. After a diligent search, including a survey of many possible sites, the only available location which appeared to meet these requirements was a site located within the area of Urban Renewal No. 2 in downtown Fargo, on the corner of Fourth Street South and Main Avenue. This site was at the intersection of two major thoroughfares with two-way traffic and thus provided good customer convenience. Under the Urban Renewal program, the land had been cleared thus eliminating the high cost of acquiring and demolishing existing structures.



At that time the only basis for establishing a drive-in facility was by utilizing the criteria established by state law for a drive-in facility which limited such a facility to within 1500 feet of the main banking house. Accordingly, First National was compelled to make application under USC, Title 12, S 36, for permission to operate a branch at the proposed new location. Such authority was approved by the Comptroller of the Currency and Certificate No. 16420A was issued. At the same time the branch was opened, the drive-in facility located at the banking house on Broadway was closed.

In reflecting on our present situation, particularly in light of the action by the 1973 Legislature in liberalizing the criteria for the establishment of a separate drive-in facility by permitting such facility to be located within three miles of the city limits rather than 1500 feet from the main banking house, we feel that the existing drive-in facility located at Fourth Street and Main Avenue should be classified as simply an extension of the main banking house rather than a branch.

The following reasons are cited:

1. Both are located within the core of downtown Fargo. The Drive-in facility is separated from the main banking house by a distance of only 550 feet.
2. The only structure located between the main banking house and the drive-in facility is a seed warehouse located on railroad right-of-way.
3. The only property located between the main banking house and the drive-in facility consists of railroad right-of-way and a dedicated street. There is no private property.

4. At the time the drive-in facility was constructed, both economics and customer convenience dictated that it not be located adjacent or any closer to the main banking house.

5. The site selected was the only practical available site on which to locate the drive-in facility.

This letter, therefore, is a request for permission to withdraw the present authority to operate a branch under Certificate No. 16420A and have the drive-in facility deemed an extension of the main banking house.

If this request is granted, we then propose to use our branch authority to establish a new branch in an area of Fargo presently without a banking house. The location of the proposed branch is in the vicinity of 28th Avenue and University Drive South. The geographic area to be served by the proposed branch is bounded by Interstate Highway 94 on the North, Interstate Highway 29 on the West and the Red River on the East. The southerly boundary is open and continually moving south as new commercial and residential areas are developed. South is the normal and natural direction for Fargo to grow. Included in the area described are many business establishments which maintain regular accounts with our bank plus several large residential areas in which many of our customers reside.

Presently 61% of the bank's business is transacted at the drive-in facility. Since drive-in banking is impossible at our main banking house, the existing drive-in facility serves as a necessary adjunct and extension of services offered there to serve customers who find this facility convenient. The proposed branch on South University would add a convenience factor to many of the bank's customers



located within the area to be served on the south side of Fargo.

The granting of the request contained in this letter will also place First National in an equal competitive situation with other national banks in Fargo. Two of the three other national banks operate drive-in facilities near their main banking house and have an additional branch within the criteria established by present North Dakota law. The third has sought permission to operate an additional branch but was denied for other reasons. Permission to withdraw the present branch authority will enable First National to seek the same authority for the operation of a branch as the other national banks and the State banks, operating under North Dakota law, located in Fargo.

Yours very truly,

/s/ R. D. HARKISON
President
RDH:mw
cc: Mr. Richard J. Blanchard

## APPENDIX G

## FIRST NATIONAL BANK

August 15, 1974
Mr. Richard J. Blanchard
Deputy Comptroller
Office of the Comptroller of the Currency
Washington, D.C. 20220

Re: Drive-in Facility
Branch Certificate No. 16420A

Dear Mr. Blanchard:

Thank you for the opportunity for Mr. Feste and myself to visit with you and Mr. Jiran on August 8 about the withdrawal of the branch certificate for our present drive-in facility.

The additional information we discussed has been prepared and is included in the enclosed booklet containing our proposal. I hope the information presented will provide you will sufficient data to grant our request for a withdrawal of the branch certificate.

Yours very truly,

/s/ R. D. HARKISON
President
RDH:es
Encl.

The following is a presentation of the proposal to the Comptroller of the Currency whereby The First National Bank and Trust Company of Fargo requests permission to withdraw its present authority to operate a branch under Certificate No. 1642A and for permission to continue to operate the drive-in facility as an extension of the customer service provided from its main banking house.



In 1971, presented with the forced curtailment of the drive-in facility at its main banking house, First National was compelled to seek a new location for this significant customer service. The bank recognized the need to have this facility reasonably close to the main banking house yet provide customers with maximum convenience under the circumstances. At that time, the criteria of state law for establishing a drive-in facility limited the distance to 1500 feet from the main bank building.

The bank applied for and received from the Comptroller authority to operate a branch at its selected location. At the same time, it closed the drive-in facility formerly operated at its main banking house which now has been rendered completely obsolete because of construction of a pedestrian mall on Broadway.

It is submitted that the relevant facts bring this proposal within the established criteria for designating the drive-in facility as an extension of operation from the main banking house. In support of this, the following is submitted:

1. The distance separating the main banking house and the drive-in facility is only 550 feet.

2. There is only one intervening structure in a direct line.

3. Without drive-in service at its main banking house, the facility at Main Avenue and Fourth Street is simply an extension of a customer service formerly offered at its main banking house and the two facilities fall within the criteria of the "unity of operation" concept.

4. Under existing state law in North Dakota, state banks are permitted to have two "drive-in" facilities. Without such a facility at its main banking house, First National meets the criteria of the "competitive equality" concept. It does not have a competitive advantage either over state banks or other national banks. If permission to withdraw the present branch authority is granted, the bank will be in the same position as other banks insofar as seeking authority to open a branch under *12 USC §36(f)* and within the framework of present state law as it relates to extended facilities for state banks.

The photographs and other material included in the following pages of this proposal are submitted as additional supporting data.

Factors which support the position that the drive-in facility located at Main Avenue and Fourth Street is an extension of the banking operation conducted at the main banking house are as follows:

1. *Mail.* All mail from the bank is addressed to and received at the main banking house. Any mail that is applicable to the drive-in facility is handled by the appropriate department head pertaining to that phase of the banking operation. Only one address, that of the main banking house, is used as a return address on all out-going mail from the bank. No correspondence to any customer is originated by drive-in personnel at the drive-in facility.

2. *Telephone.* The switchboard at the main banking house receives all incoming calls and distributes these calls to the appropriate departments including the drive-in facility.



3. *Logo.* All signage, stationery, forms, calling cards and other symbols are identical with no distinction between the main bank and the drive-in facility.

4. *Management.* No management level operating staff is present at the drive-in facility, nor are management level decisions made by the tellers located there. Policies concerning personnel are established by the personnel department located at the main bank. No individual at the drive-in facility answers questions pertaining to loans or investments.

5. *Status of Tellers.* Tellers at the drive-in facility report to the operations officer located in the main bank. All tellers at the drive-in facility have had training experience at the main bank under the supervision of a head teller. Tellers are rotated and substituted freely between the main bank and the drive-in. The duties of the tellers are the same at either location.

6. *Control.* No single officer has over-all responsibility for the drive-in facility. The maintenance officer handles both locations as does the single operations officer and the personnel officer. All three are headquartered in the main banking house. On Saturday when the main bank is closed, junior officers are assigned on a rotation basis to be present and field questions concerning operations from the tellers at the drive-in.

7. *Cash.* The drive-in facility handles approximately 60 per cent of the bank's cash transactions. As excess cash builds, it is transferred daily or more frequently to the main bank vaults by a local armored car ser-

vice. Coin is delivered daily to the drive-in facility by bank messengers from the main bank as required to meet customers' needs.

8. *Parking Spaces.* A nominal number of parking spaces is available at the drive-in facility. They are used primarily by more elderly customers of the bank who like the convenience of transacting business at the drive-in location, but who are apparently apprehensive about using automated equipment or conversing through electronic speakers.

9. *Records.* No separate accounting records are maintained of the activity of the drive-in facility. All operating input and output records are transported back and forth daily by means of bank messenger. The daily cash balancing is a part of the main bank operating procedure and drive-in differences are located, if possibly, by a staff from the main bank. All signature cards are maintained in the main bank.

10. *Night Depository.* Night and letter-drop deposit facilities at the main bank and drive-in facility are keyed to open with the same pass keys. The service is interchangeable and customers may deposit their night depository bags at either facility and are able to pick up the bags at either facility. All records for the night depository are maintained at the main office.

11. *Loans.* No loans are transacted at the drive-in facility. Customers who are in need of the loan function of the bank are referred to the main bank. Any payments not of the regular monthly coupon variety normally handled by teller are referred to the appropriate department in the main banking house.



12. *Limited Service.* The drive-in facility handles only paying and receiving transactions. It does not provide safety deposit boxes, notary service, collection, loans or the sale of securities. It is not intended to be a "full service" location.

13. *Meals.* Employees at the drive-in facility walk daily to the main office to use the cafeteria located there for their noon meal.

14. *Combined Use.* Recently a portion of the building housing the drive-in has been in use as an office for the marketing department of the bank. The head of that department handles the marketing for the entire bank, as well as serving as a regional marketing representative for the parent organization.

---

The following demonstrates that the opening of the "drive-in" facility in December 1972 by First National had no adverse economic impact on other banks.

THE FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO
Fargo, North Dakota

SHARE OF MARKET—TOTAL DEPOSITS

As of Year Ends

| | Pre-Auto Bank 12-31-71 | Auto Bank Opened 12-72 12-31-72 | Post Auto Bank 12-31-73 | Post Auto Bank 6-30-74 |
|---|---|---|---|---|
| Total Deposits (Million) | | | | |
| First National, Fargo | 58,550 | 66,650 | 66,335 | 62,063 |
| Percent of Market | 27.9 | 28.2 | 27.6 | 26.6 |

---

The City of Fargo Urban Renewal Project No. 2 included the area between Main Avenue and the Burlington Northern right-of-way between Fourth Street and Broadway. The plan included the razing of the structures, those occupied by Interstate Seed and Grain Company, with the ultimate clearing of the land. While the Urban Renewal Project has been terminated, present plans for the development of downtown Fargo include the demolishing of the structures described as indicated by the enclosed letter from the City of Fargo Planning Coordinator. Consequently, future plans for downtown Fargo indicate there undoubtedly will be no intervening structure between the main bank building and the drive-in facility.

---



CITY OF FARGO
North Dakota
58102

Planning Commission
Phone 235-3758

August 15, 1974

Mr. Homer W. Ludwick, Vice President
The First National Bank and Trust
Company of Fargo
15 Broadway
Fargo, North Dakota 58102

Dear Mr. Ludwick:

In response to your inquiry concerning the status of land between Main Avenue and the Burlington Northern tracks between Broadway and Fourth Street South, the following information is submitted.

The area was included within the boundaries of the second Urban Renewal project and the plan was to acquire the improvements including the structures occupied by Interstate Seed and Grain Company and raze them. While the second Urban Renewal project appears to be concluded, present development plans for downtown Fargo and the area in question include the clearing of the area in question. When and how this can be accomplished, I cannot say.

Yours very truly,

/s/ KEITH J. BURKHOLDER
Planning Coordinator

KJB:wb

---

The next five pages are a pictorial and graphic illustration of the relationship of the drive-in facility to the main banking house of The First National Bank and Trust Company of Fargo.

1. View from sixth floor of bank building looking southeast toward drive-in.
2. View from ground level looking southeast toward drive-in.
3. Aerial view looking northwest from drive-in toward main bank building.
4. Aerial view looking southeast toward drive-in.
5. Plat showing portion of downtown area of City of Fargo.

View from ground level looking southeast toward drive-in

A-82

Aerial view looking northwest from drive-in main bank building.

1. Main Banking House

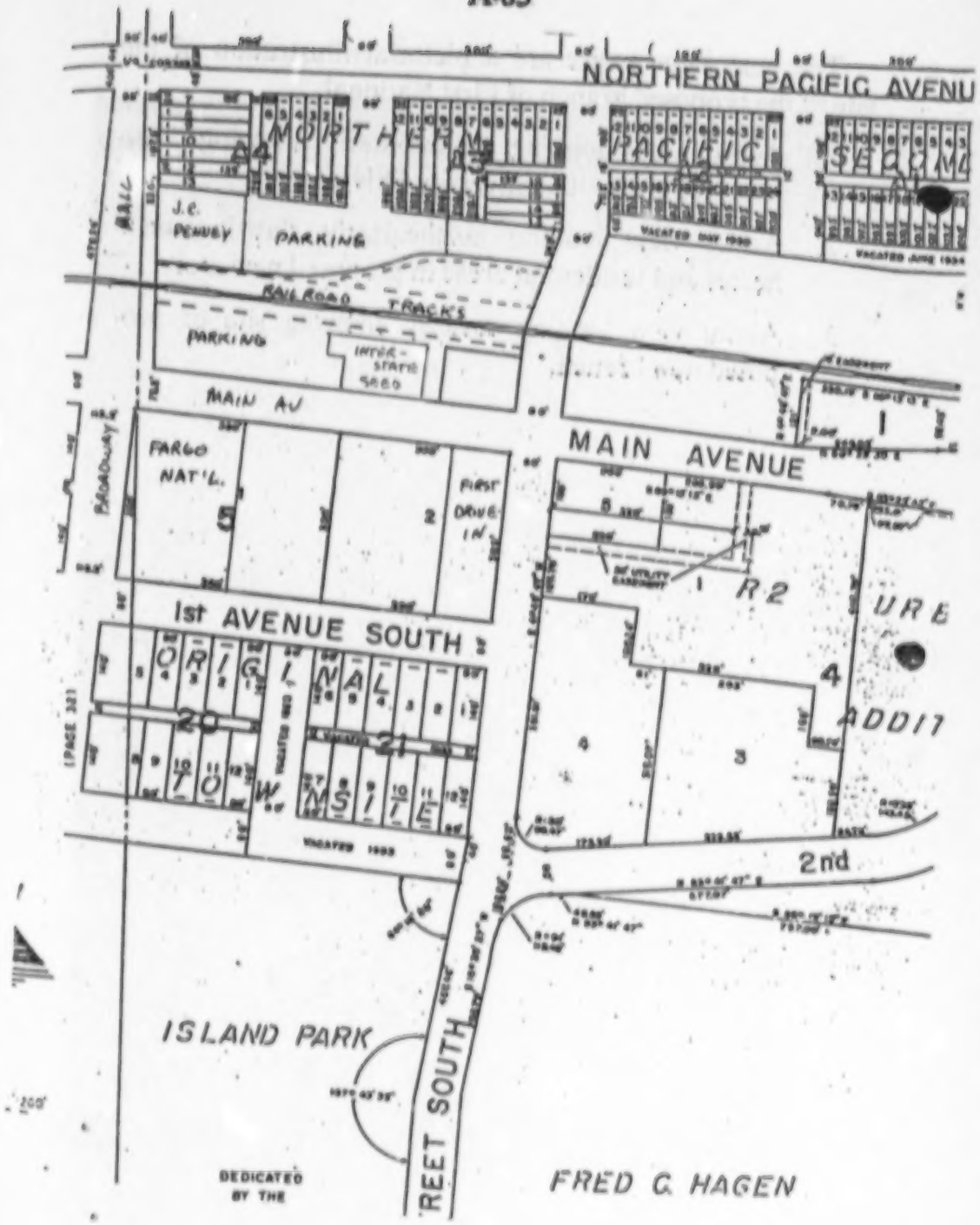
2. Drive-in Facility

A-83

Aerial view looking southeast toward drive-in.

1. Main Banking House
2. Drive-In Facility



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The next three pages are a pictorial illustration of the site of the proposed branch of First National.

1. Aerial view looking southeasterly showing businesses along South University Drive.
2. Aerial view looking northeasterly showing businesses and residential areas in proposed new area.
3. Aerial view looking easterly showing site of proposed new branch.

Aerial view looking northeasterly showing businesses and residential areas in proposed new area.
Photography by Ervin

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Aerial view looking easterly showing site of proposed new branch.

A-89

Supreme Court, U. S.
FILED
SEP 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1802

FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO,
a National Banking Association,
Petitioner,

vs.

DAKOTA NATIONAL BANK AND TRUST CO.,
a National Banking Association,
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

### INTRODUCTORY NOTE

In this brief, Dakota National Bank and Trust Co., respondent, will be referred to as "Dakota National". Robert Bloom, acting Comptroller of the Currency, will be referred to as "Comptroller". First National Bank and Trust Company of Fargo, petitioner, will be referred to as "First National". First National's drive-in walk-up facility located at 404 Main Avenue,

Fargo, North Dakota, will be referred to as the "Auto Bank" and the First National facility located at 2737 South University Drive in Fargo, North Dakota, will be referred to as the "Southside Bank". Appendix page references in this brief are to the appendix included in the petition filed by First National in this court.

## CITATION TO OPINION BELOW

Subsequent to the filing of First National's petition the decision of the United States Court of Appeals for the Eighth Circuit was reported at 554 F.2d 345.

## STATEMENT OF THE CASE

### A. Statement of Facts.

The statement of facts included in First National's statement of the case omits relevant facts and contains inaccuracies. The decision by the Eighth Circuit includes a complete and accurate recitation of the facts giving rise to this litigation and accordingly, is adopted by reference as Dakota National's statement of facts. See 554 F.2d 345, 348-580 and A.-4 through 9.

### B. Supplemental History of Litigation.

Particularly as it relates to the basis for the Eighth Circuit Decision, First National's "history of litigation" is distorted. Since this Court has the Eighth Circuit decision before it, Dakota National does not believe that it is necessary to correct those distortions at this point in the brief.

On June 20, 1977, First National filed its petition for a writ with this Court. Thereafter the Solicitor General on behalf



of the Comptroller applied for an extension of time to and including August 12, 1977, within which to file a petition for a writ of certiorari. On July 5, 1977, Mr. Justice Blackmun signed an appropriate order granting the Solicitor General's application. On July 11, 1977, Dakota National filed its application for an extension of time until September 12, 1977, within which to file its brief in opposition to the petition for writ of certiorari, which application was also approved. The Solicitor General has failed to file a petition on behalf of the Comptroller and the August 12th, 1977 deadline for doing so has long since expired.

## REASONS FOR NOT GRANTING THE WRIT

**1. The Decision of the Eighth Circuit Is in Harmony With the Holdings of This Court and Is Not at Odds With the Decisions of Other Circuits.**

First National apparently contends that contrary to *First National Bank v. Dickinson*, 396 U.S. 122 (1969), the Eighth Circuit relied upon North Dakota law in determining that the Auto Bank was a branch under § 36(f) of the McFadden Act. [12 U.S.C. 36(f)]. The Eighth Circuit did no such thing. At page 351 of its decision (544 F.2d 345) the Court stated:

> "[3] First National Bank v. Dickinson, 396 U.S. 122, 134, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969) established that the definition of a branch bank is a threshold question to be determined as a matter of federal law. Two elements comprise the federal definition of branch bank as outlined by the Court in First National Bank v. Dickinson, supra, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312; they relate generally to (1) the types of services offered and (2) to the location of a facility.
>
> "The Supreme Court's judicial construction of 'branch' emanates from the federal statute which provides:
>
> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent.
>
> "McFadden Act, 12 U.S.C. § 36(f)."

After a detailed analysis as to why First National's Auto Bank was a branch, as a matter of federal law, the Eighth Circuit reiterated:



> "However, we reemphasize that the primary determination of whether or not that facility is a branch is a matter of federal law." 554 F.2d 345, 354.

Without question the Auto Bank is a branch under the definition of branch included in § 36(f) of the McFadden Act [12 U.S.C. 36(f)] and as judicially construed by this Court in *First National Bank v. Dickinson*, supra, 396 U.S. 122. What the Eighth Circuit refused to do here and in its earlier decision in *Nebraskans for Independent Banking v. Omaha National Bank*, 530 F.2d 755 (1976) vacated and remanded, 426 U.S. 310 (1976), was to weaken the doctrine and policy of competitive equality established by the McFadden Act. The Eighth Circuit limited and subordinated the utilization of the standards that have been fashioned by the Comptroller for use in determining whether a particular facility is a branch or not. Thus, the Eighth Circuit held that the Comptroller's standards could not be used to sustain the Comptroller's conclusion that the Auto Bank was not a branch in the face of the federal statutory definition of "branch" included in 12 U.S.C. 36, and the doctrine of competitive equality.

The Eighth Circuit decisions do not totally discard utilization of the Comptroller's standards to determine whether a particular facility is a branch or not. But their use is restricted by requiring a threshold determination that a state banking association would be permitted to establish a like facility.

A review of the decisions of other circuits, cited by First National in its petition, shows that there is no conflict with the Eighth Circuit.

In *North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (1972) the Tenth Circuit in affirming that the facility in question was not a branch carefully noted at p. 824:

> "It affords no competitive advantage as apparently such arrangements are not prohibited by Utah law."

In *Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank*, 515 F.2d 154 (1975), cert. denied, 423 U.S. 869 (1975), the Fourth Circuit noted that the facility in question was authorized under both state and federal law.

*Central Bank v. Smith*, 532 F.2d 37 (7th Cir. 1976) relates to the issuance of a bank charter rather than a branch certificate. Dakota National is unable to ascertain how the decision conflicts with the Eighth Circuit decision in this case.

Nor does *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), cert. denied — U.S. — (1977), demonstrate any conflict. Indeed, at page 935 of the decision the Court noted:

> "[9] The same admonition applies with equal force to the facts of the instant case: Again we are confronted with an attempt to secure for national banks branching privileges which many states deny to competing state banks. The utility of CBCT's is obvious; several states permit state-chartered banks to use this eminently sensible mode of operations, but the policy of those states who choose to prohibit CBCT's is not open to judicial review or to modification by the Comptroller. The policy of competitive equality defers to state standards, not to standards prescribed by the Comptroller."

Neither the decisions of this Court nor the decisions of other circuits are in conflict with the decision of the Eighth Circuit in this case. None of the Courts of Appeal have approved, expressly or implicitly, the standards which the Comptroller has fashioned for determining whether a particular facility is a branch bank or not, where application of those standards would permit a national bank to operate a facility prohibited to a state banking association under state law.



In vacating the Eighth Circuit judgment in *Nebraskans*, supra, this Court stated at 426 U.S. 310-11:

> "From the time petitioner Omaha Natioinal Bank sought approval from the Regional Administrator of National Banks of its drive-in/walk-in facility until after the en banc decision of the Court of Appeals, Nebraska law permitted a state-chartered bank to operate one 'attached auxiliary teller office' and not more than two 'detached auxiliary teller offices.' Neb Rev Stat § 8-157(2) (1974). The two types of 'auxiliary teller offices' were defined in Nebraska Department of Banking Reg § 8-157-01 (1970). The Court of Appeals found it 'abundantly clear' that a state bank situated like Omaha National would not be permitted to operate the added facility, and ruled that under 12 USC § 36 [12 USCS § 36], see First Nat. Bank v. Dickinson, 396 US 122, 135, 24 L Ed 2d 312, 90 S Ct 337 (1969), the facility was a branch which the bank was not permitted to operate. 530 F2d 755, 762 (CA8 1976).
>
> "Since the en banc decision, § 8-157(2) has been amended by Legislative Bill 763, approved by the Governor on March 11, 1976, to redefine 'auxiliary teller' facilities which state banks may operate. It appearing that this amendment, which will become effective in July 1976, may have a substantial bearing on the outcome of this case, the petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of Legislative Bill 763. "So ordered."

First National has suggested in its petition that vacation and remand in *Nebraskans*, supra, supports its claim of error here by the Eighth Circuit. The opposite inference is suggested by this Court's action. Otherwise, why would the Eighth Circuit be directed to reconsider its decision in light of a change in Nebraska law? Under the Comptroller's standards, state law does

not come into play at all in resolving whether a particular facility is or is not a branch.

Without question the Eighth Circuit has remained faithful to both the federal definition of "branch" included in 12 U.S.C. § 36, see *First National Bank of Dickinson*, 396 U.S. 122, 135 (1969) and the doctrine of "competitive equality." The petition should not be granted.

2. **The Eighth Circuit Correctly Held That a Determination of Law by the Comptroller Is Judicially Reviewable on a De Novo Basis.**

*Camp v. Pitts*, 411 U.S. 138 (1973) involved the standards of review applicable to the exercise of discretionary power by an administrative agency. The status of the Auto Bank as a branch under 12 U.S.C. § 36(f) is a question of law and resolution of that question does not involve the exercise of discretionary power by the Comptroller. Accordingly, the Comptroller's legal conclusion is not reviewable under the "arbitrary and capricious" standard as argued by First National. The correct standard is as suggested by the Ninth Circuit in *Seattle Trust & Savings Bank of California*, 492 F.2d 48 at 50 (1977):

> "The arbitrary and capricious standard has been judicially fashioned to protect against the wrongful exercise of discretion by the Comptroller regarding factual controversies. In this case, however, the principal issue was whether the Comptroller has acted within the limitations imposed upon him by federal and state law, not whether he has acted reasonably or unreasonably. If the Comptroller was incorrect in his interpretation of the law, he should have been overruled in the District Court. First National Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343, reh. den., 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 680 (1966). This standard of review has been customarily applied to cases involving interpretation of 12 U.S.C.A. §36(c). See First National Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1966)."



The Eighth Circuit properly reviewed the Comptroller's interpretation of law on a *de novo* basis. Since he was incorrect with respect to the law it is immaterial whether the Comptroller acted reasonably or unreasonably.

3. **The Eighth Circuit's Holding That the Existence of the Bank of North Dakota Does Not Provide National Banks With Unlimited Branching Authority in North Dakota Provides No Basis for Writ Review.**

The State of North Dakota, as an exercise of its sovereign power engages in banking as the Bank of North Dakota. Neither the District Court nor the Eighth Circuit reached the issue as to whether its implementing legislation (Chapter 6-09 of the North Dakota Century Code) authorizes the Bank of North Dakota to engage in branch banking.[1]

First National simply asks this Court to assume that the Bank of North Dakota enjoys unlimited branching authority. Such an assumption is hardly justified and furthermore is unnecessary in light of the disposition of this issue by the Eighth Circuit in this case. The Eighth Circuit said:

> "The McFadden Act provides the following definition of a 'state bank' for the purposes of this Act:
>
> "The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust com-

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[1] The District Court did observe in passing that the Bank of North Dakota has operated only one banking facility since its inception. (See A. 54, fn. 9)

panies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

"12 U.S.C. § 36(h). The definition obviously does not address the specific problem of a state-owned bank as a bank operating 'under the authority of State laws.' However, the character of the Bank of North Dakota, as interpreted by the District Court and with which we agree, is that of an agency of the sovereign power. It is in effect an arm of the state of North Dakota. It would be inimical to the policy of competitive equality to accord privately-owned, nationally-chartered banks the same privileges given to the sovereign when they are denied to privately-owned, state-chartered banks. We are persuaded that competitive quality was intended to be maintained between the privately-owned banking institutions, state and federal, rather than between the national banks and the state itself in its banking endeavors. As such, we do not include the Bank of North Dakota within the definition or meaning of §§ 36(h) or 36(c). We express no opinion as to whether the Bank of North Dakota has unlimited branching powers under state law." (*Nebraskans*, supra at 356)



## CONCLUSION

Apparently upon reflection, the Solicitor General, on behalf of the Comptroller, has determined that the decision by the Eighth Circuit does not warrant review. In submitting its petition for a writ of certiorari, First National has advanced no special or important reasons for granting a writ in this case. None exists. Accordingly, Dakota National respectfully requests that the petition for writ be denied.

Dated this 12th day of September, 1977.

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No. 76-1802

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO, PETITIONER

*v.*

DAKOTA NATIONAL BANK AND TRUST CO., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY

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WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

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**MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY**

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Petitioner contends that the court of appeals erred in reversing the Comptroller of the Currency's determination that petitioner's drive-in banking facility was not a "branch bank" within the meaning of 12 U.S.C. 36(f).

National banks, subject to the approval of the Comptroller, may establish a new "branch" "if such establishment and operation are at the time expressly authorized to State banks by the law of the State * * *." 12 U.S.C. 36(c). The purpose of this provision is to establish competitive equality in branching opportunities between national and state banks. See *First National Bank* v. *Dickinson*, 396 U.S. 122. A "branch" is defined by 12 U.S.C. 36(f) as "includ[ing] any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

In 1971, petitioner, a national bank located in Fargo, North Dakota, had a drive-in teller facility attached to its main office, but urban renewal plans proposed to close the street that gave access to the facility. Accordingly, petitioner applied to the Comptroller for permission to establish, as a "branch", a drive-in teller facility 550 feet in a direct line (1250 feet by the normal route) from its main office. The Comptroller granted the application and the new facility was constructed.

In 1971, North Dakota law had permitted a state bank to operate only one "facility for drive-in and walk-up service" that was "separate and apart from its banking house," and that facility had to be within 1500 feet of its banking house (Pet. App. C, p. A-5). North Dakota law was changed in 1973 to permit each state bank to operate one such facility within a three-mile radius of the limits of the city within which its main office was located (Pet. App. E, pp. A-64 to A-65).[1]

In 1974, petitioner asked the Comptroller to reclassify its drive-in facility as an "extension," rather than a branch, of its main office (Pet. App. C, p. A-5). The Comptroller did so, on the grounds, *inter alia*, that petitioner was physically unable to have a drive-in facility at its main office, no closer property was available, the facility would be dependent upon the main office, and the operation of the facility "had not affected the competitive balance in the market" (*id.* at A-7).

Petitioner then applied to the Comptroller for permission to open a more distant "branch" bank in Fargo. The

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[1]In addition, North Dakota has established a state-owned bank, the Bank of North Dakota, whose statutory authorization appears to permit unlimited branching. North Dakota Century Code § 6-09-02 (1975) (Pet. App. E, p. A-66).



Comptroller authorized establishment of such a branch. (Pet. App. C, pp. A-8 to A-9). Petitioner's competitor, another national bank, then brought suit in the United States District Court for the District of North Dakota for injunctive and declaratory relief, claiming that petitioner would have two branches in violation of North Dakota law and 12 U.S.C. 36(c). The district court denied relief, but the court of appeals reversed, holding (1) that whether the drive-in facility is a "branch" is a question of a law subject to *de novo* judicial review and not review on an arbitrary and capricious standard, (2) that while that question is one of federal law, petitioner's drive-in facility is a "branch" because state banks, under state law as reflected in the opinions of the State Banking Commissioner and the State Banking Board, would be limited to one such facility, and (3) that the state-owned Bank of North Dakota is not a "state bank" within the meaning of 12 U.S.C. 36(c) or (h) (Pet. App. C).

1. We agree with petitioner that the court of appeals erred in reversing the determination of the Comptroller.

a. While the court purported to recognize the established principle that what is a "branch" within the meaning of 12 U.S.C. 36 is a question of federal law, in resolving that question the court focused almost exclusively on whether as a matter of state law, as reflected in the opinions of state banking administrators, a state bank would be permitted to operate a similar facility similarly located (Pet. App. C, pp. A-18 to A-21). The effect of framing the inquiry in that manner was to give almost conclusive effect to state law and state definitions in determining what constitutes a branch bank within the meaning of a federal statute. The decision thus appears to depart from this Court's teaching in *First National Bank*

v. *Dickinson*, 396 U.S. 122, that federal law alone applies to resolve "the threshold question" of what constitutes a branch (396 U.S. at 133 n. 7, 134) and that "to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers" (396 U.S. at 133). The court of appeals should have determined whether the facility was a "branch" solely by reference to federal law and only then have considered state law in determining whether state law would have expressly authorized a state bank to establish the branch.

b. While the question of what is a branch may be a question of law, it nevertheless turns on the judgmental assessment of a number of factual questions that are peculiarly within the administrative expertise of the Comptroller. Thus the courts have identified a number of factors to be considered, relating to the functions of the facility, its physical location in relation to the main office, its functional dependence on the main office, and, most significantly, its capacity to provide the bank with "a material competitive advantage in securing customers." *Nebraskans for Independent Banking, Inc.* v. *Omaha National Bank*, 530 F. 2d 755, 761 (C.A. 8), vacated and remanded on other grounds, 426 U.S. 310. Accordingly, the ultimate question, although perhaps technically one of law, is not dissimilar to the question considered by the Comptroller in *Camp* v. *Pitts*, 411 U.S. 138, *i.e.*, whether a new bank would be "an uneconomic venture in light of banking needs and the banking services already available in the surrounding community" (411 U.S. at 143)—a question that this Court held to be reviewable on an abuse of discretion standard. Thus, whether a question of law or fact, the Comptroller's determination is entitled to substantial



deference from a reviewing court. Cf. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Gray* v. *Powell*, 314 U.S. 402, 411.[2]

c. The court of appeals also erred in concluding that the Bank of North Dakota is not a "state bank" within the meaning of 12 U.S.C. 36(c) and (h). The competitive equality between state and national banks that those provisions were designed to preserve could be significantly undermined if states may establish state-owned banks that are not subject to the branching restrictions imposed on private state, and thus private national, banks.[3]

2. The practical import of the decision below is not clear, for the court's errors are largely ones of misplaced emphasis, and the ultimate question whether petitioner's facility is a branch is one that turns on its own particular facts.[4] Because of this, the Solicitor General determined not to file a petition for a writ of certiorari on behalf of the Comptroller. If the instant petition is granted, however, the Comptroller will support petitioner's contention

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[2]This is particularly true in the case of the Comptroller, who has responsibility for determining the same question in 50 different states and the District of Columbia.

[3]We are informed that the Bank of North Dakota, which has one main banking office in Bismarck, has recently established a branch office in Towner, North Dakota, but it is not yet clear whether that branch is to be temporary or permanent.

[4]The question whether a state-owned bank constitutes a "state bank" appears to be confined to North Dakota, for that state appears to be the only one that has established a significant state-owned commercial bank. Moreover, that bank has not yet engaged in significant branching activities, and its right to do so under North Dakota law has not been authoritatively determined.

that the court of appeals erred in reversing his determination that petitioner's facility is not a branch bank.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

SEPTEMBER 1977.

DOJ-1977-09